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"I'm Dying to Tell You What Happened": The Admissibility of Testimonial Dying Declarations Post-*Crawford*

Peter Nicolas
University of Washington School of Law

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by PETER NICOLAS*

Introduction

Imagine the following scenario: David is shot in the chest by Paula and believes that he is dying. The paramedics arrive, and David says to them, "Before I die . . . I need to tell you . . . that Paula shot me . . . You . . . also . . . should . . . know . . . that . . . Brenda . . . robbed . . . First National Bank . . . last . . . month." As it turns out, David survives, and Paula and Brenda are indicted, respectively, for attempted murder and bank robbery in separate state court proceedings in Utah. Although David is alive, prosecutors are not able to secure his testimony, either because he refuses to testify or simply cannot be found by prosecutors. Accordingly, they offer the paramedics' testimony about what David said under Utah's hearsay exception for dying declarations, which provides, in relevant part, as follows:

The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

> (b)(2) *Statement under belief of impending death.* In a civil or criminal action or proceeding, a statement made by a declarant

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> while believing that the declarant's death was imminent, if the judge finds it was made in good faith.[1]

The defense objects on Confrontation Clause grounds, but the prosecution contends that the paramedics' testimony falls within the "dying declaration exception" to the Confrontation Clause. How should the court rule? The answer to this question requires resolution of a key issue left open by the U.S. Supreme Court that has just begun to attract the attention of the lower courts: is there a "dying declaration" exception to the command of the Confrontation Clause, and if so, what is its scope?

There has always been an uneasy tension between the admissibility of dying declarations (and, more generally, hearsay evidence) and the seeming command of the Confrontation Clause of the Sixth Amendment to the United States Constitution[2] and analogous provisions in state constitutions that the accused be given the right to confront the witnesses testifying against him. When first asked to resolve the tension between the dying declaration exception and the Confrontation Clause at the end of the nineteenth century, the United States Supreme Court, in *Mattox v. United States*,[3] brushed it to one side, reasoning as follows:

> Many of [the Constitution's] provisions in the nature of a bill of rights are subject to exceptions, recognized long before the adoption of the constitution, and not interfering at all with its spirit. Such exceptions were obviously intended to be respected. A technical adherence to the letter of a constitutional provision may occasionally be carried further than is necessary to the just protection of the accused, and further than the safety of the public will warrant. For instance, there could be nothing more directly contrary to the letter of the provision in question than the admission of dying declarations. They are rarely made in the presence of the accused; they are made without any opportunity for examination or cross-examination, nor is the witness brought face to face with the jury; yet from time immemorial they have

1. *See* UTAH R. EVID. 804(b)(2). Under the Utah Rules of Evidence, as under the Federal Rules of Evidence and those of most states, a declarant is deemed "unavailable" if she, inter alia, refuses to testify or is absent from the hearing and cannot be procured by the proponent by process or other reasonable means. *See* UTAH R. EVID. 804(a)(2), (a)(5); FED. R. EVID. 804(a)(2), (a)(5).

2. *See* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him").

3. Mattox v. United States, 156 U.S. 237 (1895).

been treated as competent testimony, and no one would have the hardihood at this day to question their admissibility.[4]

Decisions issued by state high courts both prior and subsequent to *Mattox* came to the same conclusion when asked to address the issue on state constitutional grounds.[5]

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4. *Id.* at 243–44.

5. *See, e.g.*, Commonwealth v. Slavski, 140 N.E. 465, 467–68 (Mass. 1923); State v. Saunders, 12 P. 441, 442–43 (Or. 1886) ("The rule, although sanctioned by constitutional declaration, like all general rules, has its exceptions. . . . The admission of dying declarations has uniformly been held to be one of the exceptions; and it would be folly for this court to attempt to overthrow the numerous decisions to that effect."); State v. Oliver, 7 Del. (2 Houst.) 585 (1863) ("The provision of the constitution referred to, was not designed and was never understood to exclude such dying declarations as were admissible, and which were admissible even in our own courts long before any constitution was framed and adopted in the State, and have been ever since."); State v. Houser, 26 Mo. 431, 438 (1858) (The court held that to exclude dying declarations "would not only be contrary to all the precedents in England and here, acquiesced in long since the adoption of these constitutional provisions, but it would be abhorrent to that sense of justice and regard for individual security and public safety which its exclusion in some cases would inevitably set at naught. But dying declarations, made under certain circumstances, were admissible at common law, and that common law was not repudiated by our constitution in the clause referred to, but adopted and cherished."); People v. Glenn, 10 Cal. 32 (1858) ("[T]his exception to the general rule of testimony has been too firmly established to be overthrown. There would be the most lamentable failure of justice, in many cases, where the dying declarations of the victims of crime excluded from the jury."); Anthony v. State, 19 Tenn. (Meigs) 265, 277 (1838) ("[W]e are all of opinion that the Bill of Rights can not be construed to prevent declarations properly made in *articulo mortis*, from being given in evidence against defendants in cases of homicide."). Some decisions took a slightly different approach, declaring instead that, for purposes of the constitutional confrontation guarantee, the "witness" against the accused is not the declarant whose dying declaration is admitted, but rather the witness who testifies to what the deceased said. *See* Robbins v. State, 8 Ohio St. 131 (1857) ("The deceased person is not the witness, but the person who can relate, on the trial, the death-bed declarations, is the witness."); Walston v. Commonwealth, 55 Ky. (16 B. Mon.) 15 (1855) ("The person who testifies to the dying declaration is the witness against the accused."); State v. Price, 6 La. Ann. 691 (1851) (Preston, J.) ("When the dying victim ceases to exist, he is no longer a witness, and cannot be confronted with the accused; but his dying declarations remain as evidence, and the accused is only entitled to be confronted with the witnesses to those declarations."); Woodsides v. State, 3 Miss. (2 Howard) 655, 665 (1837) ("The argument proceeded upon the supposition that the deceased party was the witness, and as he could not be confronted or cross-examined by the prisoner, it was a violation of the prisoner's rights . . . If he were, or could be a witness, his declaration, upon the clearest principle, would be inadmissible. . . . It is the individual who swears to the statements of the deceased that is the witness, not the deceased."). However, such an interpretation of the Confrontation Clause of the U.S. Constitution has been rejected by the U.S. Supreme Court. *See* Crawford v. Washington, 541 U.S. 36, 50–51 (2004) ("Accordingly, we once again reject the view that the Confrontation Clause applies of its own force only to in-court testimony, and that its application to out-of-court statements introduced at trial depends upon 'the law of Evidence for the time being.'").

Finally, in 1980, the U.S. Supreme Court provided its first theoretical (as opposed to *ad hoc*) justification for admitting at least some hearsay evidence against the accused in a criminal case despite the command of the Confrontation Clause. In *Ohio v. Roberts*,[6] the Court reasoned that hearsay evidence may be admitted when the declarant is unavailable and the hearsay statement at issue is "reliable" in that it either falls within a "firmly rooted" exception to the hearsay rule or contains "particularized guarantees of trustworthiness."[7] The Court later softened the requirement that the declarant must *always* be unavailable.[8] In *Roberts*, the U.S. Supreme Court identified dying declarations as the sort of hearsay that qualified as falling within a "firmly rooted" hearsay exception,[9] a category of exceptions that appeared to be tied to longevity and widespread acceptance.[10]

But the *Roberts* approach was relatively short-lived; in 2004, the U.S. Supreme Court in *Crawford v. Washington*[11] and its progeny completely overhauled its theory of the relationship between hearsay evidence and the Confrontation Clause. No longer could the prosecution circumvent the plain language of the Confrontation

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6. Ohio v. Roberts, 448 U.S. 56 (1980).

7. *See Roberts*, 448 U.S. at 65–66.

8. *See* United States v. Inadi, 475 U.S. 387, 394 (1986) ("*Roberts* cannot fairly be read to stand for the radical proposition that no out-of-court statement can be introduced by the government without a showing that the declarant is unavailable."). Indeed, *Roberts* itself pulled away from this requirement as soon as it stated it. *See Roberts*, 448 U.S. at 65 n.7 ("A demonstration of unavailability, however, is not always required.").

9. *See Roberts*, 448 U.S. at 66 n.8.

10. *See, e.g.*, Lilly v. Virginia, 527 U.S. 116, 130 (1999) (relying on the fact that a particular application of the statement against interest exception to the hearsay rule is "of quite recent vintage" to conclude that it is not "firmly rooted"); White v. Illinois, 502 U.S. 346, 355 n.8 (1992) (relying on the fact that the hearsay exception for spontaneous declarations is over two centuries old and recognized in eighty percent of the states, and the fact that the hearsay exception for statements made for purposes of medical diagnosis and treatment is widely accepted among the states to conclude that both are firmly rooted); Bourjaily v. United States, 483 U.S. 171, 183 (1987) (relying on the fact that the co-conspirator exception to the hearsay rule was first recognized by the Court 150 years earlier to conclude that it is firmly rooted); Coy v. Renico, 414 F. Supp. 2d 744, 770 (E.D. Mich. 2006) (holding that the phrase refers to hearsay exceptions that have "long-standing and widespread use"); Capano v. State, 781 A.2d 556, 616 (Del. 2001) (noting that the finding that a hearsay exception is firmly rooted "depends in part on the longevity and widespread acceptance of the hearsay exception by courts and legislatures."); State v. Ross, 919 P.2d 1080, 1089 (N.M. 1996) ("[A] court should consider the exception's historical longevity and widespread acceptance to determine whether the exception is 'firmly rooted.'").

11. Crawford v. Washington, 541 U.S. 36 (2004).

Clause merely by showing that a hearsay statement was trustworthy, either based on a "particularized" showing of reliability or by virtue of the hearsay statement falling within a "firmly rooted" exception. Instead, the Court held that the touchstone is whether the statement at issue is "testimonial" or "non-testimonial:"[12] If the statement at issue is non-testimonial, the Confrontation Clause presents *no* barrier to admissibility.[13] But if the statement is testimonial, it is *inadmissible* unless (a) the declarant is unavailable and the defendant had a prior opportunity to cross-examine her; (b) the declarant appears as a witness at trial and can be cross-examined about the statement at issue; or (c) the statement is offered into evidence for some reason other than to prove the truth of the matter asserted.[14]

Thus, on the surface, *Crawford* eviscerated the U.S. Supreme Court's prior holding that hearsay was admissible if it fell within a firmly rooted exception. But a footnote in *Crawford* tethers to the holding an apparent exception for the firmly rooted dying declaration exception to the hearsay rule. Thus, despite the *Crawford* Court's efforts to create a clean test for admissibility that is tied to the text of the Confrontation Clause, the *Crawford* Court, like its predecessors, did not have the "hardihood" to question the admissibility of dying declarations. Accordingly, buried in footnote six of the opinion are the roots of an exception to the new rule announced in *Crawford* for dying declarations, *even if they are testimonial*:

> The one deviation we have found involves dying declarations. The existence of that exception as a general rule of criminal hearsay law cannot be disputed. Although many dying declarations may not be testimonial, there is authority for admitting even those that clearly are. We need not decide in this case whether the Sixth Amendment incorporates an exception for testimonial dying declarations. If this exception must be accepted on historical grounds, it is *sui generis*.[15]

In footnote six, the Court took pains to point out that *Crawford* did not technically decide the issue of the admissibility of dying declarations vis-à-vis the Confrontation Clause. But if the post-*Crawford* era to date is any guide, this dictum will, like other dicta in

12. *See id.* at 68.

13. *See* Whorton v. Bocking, 549 U.S. 406, 419–20 (2007); Davis v. Washington, 547 U.S. 813, 824–25 (2006).

14. *See Crawford*, 541 U.S. at 59 & n.9.

15. *Id.* at 56 n.6.

Crawford, soon become the Law of the Land.[16] After all, the *Crawford* Court also did not decide whether non-testimonial hearsay would continue to be subject to Confrontation Clause analysis, but it quickly converted its *Crawford* dictum[17] on that issue into a holding.[18] Likewise, its strong hints in *Crawford*[19] and its subsequent decision in *Davis v. Washington*[20] about using the forfeiture-by-wrongdoing exception as a means of circumventing the Confrontation Clause have likewise found their way into subsequent holdings.[21] In any event, the Court's holding in *Giles v. California*[22] four years later effectively assumes that a dying declaration exception to the Confrontation Clause exists.[23] Moreover, lower federal courts and state courts that have addressed the issue have, with near unanimity, read footnote six of *Crawford* as creating a dying declaration exception to the Confrontation Clause.[24]

Accordingly, the purpose of this Article is not to question *whether* there is a sound basis for recognizing a *sui generis* dying declaration exception to the Confrontation Clause—others have done a thorough job of considering that issue,[25] and in any event the answer to that question seems inevitable. Rather, this Article assumes that

16. Indeed, as a general matter, Supreme Court dicta can serve as a valuable predictor of future holdings. *See* Evan Caminker, *Precedent and Prediction: The Forward Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 18 (1994) ("[D]icta lack precedential status but can form the basis for predicting the Supreme Court's position on the issue addressed."); Earl M. Maltz, *The Function of Supreme Court Opinions*, 37 HOUS. L. REV. 1395, 1420 (2000) ("[A]lthough dicta does not bind the Supreme Court, it can be the most reliable prediction of the Court's likely disposition of an issue.").

17. *See Crawford*, 541 U.S. at 68.

18. *See Whorton*, 549 U.S. at 419–20; *Davis*, 547 U.S. at 824–25.

19. *Crawford*, 541 U.S. at 62.

20. *Davis*, 547 U.S. at 832–33.

21. *See* Giles v. California, 128 S. Ct. 2678, 2683–93 (2008).

22. *Id.*

23. *See id.* at 2684–86.

24. *See, e.g.*, People v. Monterroso, 101 P.3d 956, 972 (Cal. 2004); Walton v. State, 603 S.E.2d 263, 265–266 (Ga. 2004); People v. Gilmore, 828 N.E.2d 293, 302 (Ill. 2005); Wallace v. State, 836 N.E.2d 985, 993–96 (Ind. 2005); State v. Jones, 197 P.3d 815, 821–22 (Kan. 2008); Commonwealth v. Nesbitt, 892 N.E.2d 299, 310–11 (Mass. 2008); People v. Taylor, 737 N.W.2d 790, 794–95 (Mich. Ct. App. 2007); State v. Martin, 695 N.W.2d 578, 585–86 (Minn. 2005); Harkins v. State, 143 P.3d 706, 710–11 (Nev. 2006); State v. Calhoun, 657 S.E.2d 424, 426–28 (N.C. 2008); State v. Lewis, 235 S.W.3d 136, 147–48 (Tenn. 2007). *But see* United States v. Mayhew, 380 F. Supp. 2d 961, 964–65 (S.D. Ohio 2005); United States v. Jordan, 2005 WL 513501, at *3–*4 (D. Colo. 2005).

25. *See, e.g.*, Michael J. Polelle, *The Death of Dying Declarations in a Post-*Crawford *World*, 71 MO. L. REV. 285 (2006).

dying declarations constitute an exception to the Confrontation Clause, and proceeds to ask a critical question that neither *Crawford* nor the decisions that have followed it have answered and that virtually none have even raised: How does one define the phrase "dying declarations" as a *constitutional* matter?

Stated somewhat differently, it seems clear enough that—assuming a dying declaration exception to the Confrontation Clause exists—the U.S. Supreme Court would not permit a state or the federal government to circumvent the Confrontation Clause by defining their hearsay exceptions for "dying declarations" broadly to include *any and all* out-of-court statement made by a declarant (in other words, an exception that truly swallows the rule). Although such an extreme example may seem fanciful, it is nonetheless true that there is a great deal of divergence amongst the states and the federal government with respect to how they define the scope of their dying declaration exceptions to their rules against hearsay. For example, some versions of the dying declaration exception extant in the United States today can be invoked *only* if the declarant actually *dies*,[26] while other versions can be invoked whenever the declarant is "unavailable."[27] Similarly, some versions allow for the admission of dying declarations only in homicide cases in which the declarant's death (and not someone else's) is the subject of the charge,[28] while others allow for their admission in civil as well as other types of criminal cases.[29] Furthermore, some limit the scope of the exception to statements concerning the cause or circumstances of the declarant's death (or what he believed to be his death),[30] while others impose no such limit.[31]

The question that thus arises is whether there is a static[32] definition of "dying declarations" as a constitutional matter, and if so,

26. *See, e.g.*, KAN. STAT. ANN. § 60-460(e) (2008); People v. Nieves, 492 N.E.2d 109, 113 & n.3 (1986).

27. *See, e.g.*, FED. R. EVID. 804(b)(2); IOWA R. EVID. 804(b)(2).

28. *See, e.g.*, CONN. CODE OF EVID. § 8-6(2); People v. Murawski, 117 N.E.2d 88, 90–91 (1954); *Nieves*, 492 N.E.2d 109, 113 & n.3.

29. *See, e.g.*, ALASKA R. EVID. 804(b)(2); CAL. EVID. CODE § 1242; FLA. STAT. ANN. § 90.804(2)(b) (2005).

30. *See, e.g.*, FED. R. EVID. 804(b)(2); MICH. R. EVID. 804(b)(2).

31. *See, e.g.*, KAN. STAT. ANN. § 60-460(e); UTAH R. EVID. 804(b)(2).

32. By the term "static," I mean a definition that is grounded in the Constitution and is constant over time (subject, of course, to constitutional amendment or re-interpretation by the courts) and thus that does not "depend[] on the law of Evidence for the time being." Dutton v. Evans, 400 U.S. 74, 94 (1970) (Harlan, J., concurring) (quoting 5

what is that definition? Although it was not necessary for the Court in *Crawford* to address that issue in its footnote six dictum, the Court (and lower courts) likely will have to address that issue when they consider the admissibility of dying declarations in future cases involving broad versions of the dying declaration exception, such as in the scenario presented in the opening hypothetical.

This Article demonstrates the existence and delineates the scope of a federal constitutional definition of "dying declarations" that is distinct from the definitions set forth in the Federal Rules of Evidence and their state counterparts. This Article further demonstrates that states have *state* constitutional definitions of "dying declarations" (for purposes of interpreting state constitutional analogues to the Confrontation Clause of the Sixth Amendment) that may differ in important respects from the federal constitutional definition of "dying declarations." This Article then shows that some of the definitions of "dying declarations" contained in federal and state hearsay exceptions exceed the federal and state constitutional definitions of that phrase. As a result, statements admitted against the accused in criminal cases pursuant to such exceptions may run afoul of the Confrontation Clause of the Sixth Amendment and its state analogues, *even if* there exists a dying declaration exception to the Confrontation Clause.

I. The Existence of the 'Dying Declaration' Exception to the Confrontation Clause

Shortly after *Crawford*, the Supreme Court of California issued the first opinion directly[33] addressing the question whether to recognize a "dying declaration" exception to the Confrontation Clause of the U.S. Constitution.[34] In *People v. Monterroso*, the California Supreme Court considered the admissibility of a dying declaration by a liquor store clerk identifying his killer when offered against the accused in a prosecution for, among other things, the

WIGMORE, EVIDENCE § 1397, at 131 (3d ed. 1940)). *Accord* Crawford v. Washington, 541 U.S. 36, 50–51 (2004).

33. Although the Supreme Court of Georgia issued an opinion addressing the issue a few months earlier, its discussion of this issue was technically dicta (as the Court's holding was that the accused had waived his Sixth Amendment claim), and in any event it did not provide much in the way of reasoned analysis but instead merely cited footnote six of *Crawford*. *See* Walton v. State, 603 S.E.2d 263, 265–66 (Ga. 2004).

34. People v. Monterroso, 101 P.3d 956 (Cal. 2004).

murder of the clerk.[35] The accused objected, citing the Confrontation Clause of the U.S. Constitution as well as the U.S. Supreme Court's decision in *Crawford*.[36] The *Monterroso* court, citing footnote six of *Crawford*, began its analysis by noting that the U.S. Supreme Court had explicitly left the issue open in *Crawford*.[37] Next, citing historical evidence,[38] the court concluded that dying declarations were admissible at common law in felony cases, even if the defendant was not present at the time the statement was taken.[39] Citing *Crawford*'s statement that the Confrontation Clause "is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding," the court concluded that the Confrontation Clause does not bar the admission of dying declarations, *even if they are testimonial*.[40]

A review of the common law English precedents extant at the time the Confrontation Clause was ratified supports the conclusion by the *Monterrosso* Court and the strong suggestion by the *Crawford* Court that dying declarations, *even if testimonial*, were admissible at common law. First, in the 1722 trial of Hugh Reason (cited in *Monterrosso*), the court held admissible the victim's dying declaration, even though it was given under oath in the presence of two justices of the peace and reduced to writing.[41] Second, in the 1752 trial of James Macgregor and the 1753 trial of Robert Macgregor, the court held admissible the dying declaration of the victim even though it was given in the presence of two Judges, who took it down in writing.[42] Third, in the 1789 trial of William Woodcock (cited in *Crawford*)—in a case that has been described as providing the "classic statement" of the dying declaration hearsay exception[43]—the court

35. *See id.* at 970–71. The accused was also charged with the murder of a second individual and multiple counts of burglary, robbery, and false imprisonment. *Id.* at 962.

36. *Id.* at 971.

37. *Id.* at 972.

38. The evidence consisted of an early treatise on evidence, an English decision from 1722, the U.S. Supreme Court's earlier decision in *Mattox*, and a Missouri court decision from 1858. *See id.*

39. *Id.*

40. *Monterroso*, 101 P.3d at 972 & n.5.

41. *See* R v. Reason, (1722) 93 Eng. Rep. 659, 659–60 (K.B.).

42. *See* 2 DAVID HUME, COMMENTARIES ON THE LAW OF SCOTLAND RESPECTING TRIAL FOR CRIMES 229 (1800).

43. FED. R. EVID. 804(b)(2) advisory committee's note.

held admissible the victim's dying declaration despite the fact that it was made under oath to a magistrate and reduced to writing.[44]

Although *Crawford* did not definitively delineate the scope of the phrase "testimonial," it stated that, "[w]hatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations."[45] Because the examinations at issue in each of these three common law cases took place under circumstances falling within what *Crawford* defined as the minimum scope of the phrase "testimonial," each of these cases stands for the proposition that *testimonial* dying declarations were admissible at common law. Indeed, the types of practices at issue in these cases, in which "[j]ustices of the peace or other officials examined suspects and witnesses before trial," were the very sorts of practices targeted by the Confrontation Clause and thus the paradigmatic example of the sort of statements that, under *Crawford*, are deemed testimonial in nature.[46]

Most decisions issued subsequent to *Monterroso* have added little in the way of analysis, typically just citing both footnote six of *Crawford* as well as the *Monterroso* decision in support of a conclusion that dying declarations, even if testimonial, fall within an exception to the Confrontation Clause as construed in *Crawford*.[47] The only exception is *State v. Jones*,[48] issued by the Supreme Court of Kansas shortly after the U.S. Supreme Court's decision in *Giles*.[49]

In *Giles*, the U.S. Supreme Court addressed the scope of a *different* exception to the Confrontation Clause, that for forfeiture by wrongdoing.[50] Specifically, *Giles* examined whether a criminal defendant forfeits his Confrontation Clause rights whenever a judge makes a finding that a wrongful act by the accused made the witness unavailable to testify at trial (such as by killing the potential witness), or whether those rights are forfeited only if the judge finds that the accused did so *for the specific purpose of preventing the person from*

44. R v. Woodcock, (1789) 168 Eng. Rep. 352, 352–53.

45. *See* Crawford v. Washington, 541 U.S. 36, 68 (2004).

46. *Crawford*, 541 U.S. at 43–47.

47. *See, e.g.*, *Gilmore*, 828 N.E.2d at 302; *Wallace*, 836 N.E.2d at 994–96; *Nesbitt*, 892 N.E.2d at 310–11; *Taylor*, 737 N.W.2d at 794–95; *Martin*, 695 N.W.2d at 585–86; *Harkins*, 143 P.3d at 710–11; *Calhoun*, 657 S.E.2d at 426–28; *Lewis*, 235 S.W.3d at 147–48.

48. State v. Jones, 197 P.3d 815 (Kan. 2008).

49. Giles v. California, 128 S. Ct. 2678 (2008).

50. *Id.* at 2683–93.

testifying as a witness.[51] After reviewing historical evidence, the Court concluded that the accused forfeits his Confrontation Clause rights only if he acts with the intent to prevent the person from testifying as a witness.[52] In order to conclude that an accused can only forfeit his confrontation rights through intentionally impeding testimony, the U.S. Supreme Court distinguished the situation in *Giles* from cases in which common law courts admitted hearsay statements by witnesses who had been killed, but not for the specific purpose of preventing their testimony (as in a run-of-the-mill murder case in which the victim's statements are admitted).[53] The U.S. Supreme Court did so by distinguishing such cases on the ground that the statements at issue in those cases qualified as dying declarations,[54] which they described as the other type of statement that, even if testimonial, falls within a "historic exception" that they have "acknowledged . . . were admitted at common law even though they were unconfronted."[55]

In *Jones*, the Kansas Supreme Court acknowledged that the U.S. Supreme Court in *Giles* did not "definitively decide" whether dying declarations fall within an exception to the Confrontation Clause as construed in *Crawford*.[56] But it viewed such a holding as implicit in the U.S. Supreme Court's statement in *Giles* that it had acknowledged dying declarations as one of two different forms of testimonial hearsay that were admissible at common law even if unconfronted, coupled with the *Giles* Court's efforts to distinguish cases on the ground that the testimonial statements at issue in those cases qualified as dying declarations.[57] The *Jones* court expressed its "confiden[ce] that, when given the opportunity to do so, the Supreme Court would confirm that a dying declaration may be admitted into evidence, even when it is testimonial in nature and is unconfronted."[58]

To be sure, the lower federal and state courts have not been unanimous in concluding that dying declarations qualify as an exception to the Confrontation Clause. Two federal trial court opinions have held otherwise, focusing primarily on the fact that

51. *Id.*
52. *Id.*
53. *Id.* at 2684–86.
54. *Id.*
55. *Id.* at 2682.
56. State v. Jones, 197 P.3d 815, 821 (Kan. 2008).
57. *Id.* at 821–22.
58. *Id.* at 822.

dying declarations are of dubious reliability,[59] a focus that *Crawford* itself directly rejected in overruling *Roberts*.[60] Moreover, of these two decisions, one was unpublished[61] and the other went on to find the evidence at issue to nonetheless be admissible on forfeiture grounds.[62] It is perhaps for some combination of these reasons that every other court to consider the issue has found *Monterroso* to be more persuasive, and has often said so explicitly.[63]

II. The Scope of the 'Dying Declaration' Exception to the Confrontation Clause

Assuming that the U.S. Supreme Court will eventually state, in explicit terms, that there exists a dying declaration exception to the Confrontation Clause, the next question is, how will the Court define the phrase "dying declaration" as a constitutional matter?

That the Court will develop a static constitutional definition of the phrase "dying declaration" seems so obvious that it hardly seems to require any support. After all, without such a definition, the federal government and the states could simply circumvent the Confrontation Clause by creating broadly defined hearsay exceptions for "dying declarations" that encompass every sort of hearsay imaginable.[64] Nonetheless, it is worth identifying some pre-*Crawford*

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59. *See* United States v. Mayhew, 380 F. Supp. 2d 961, 965, n.5 (S.D. Ohio 2005); United States v. Jordan, 2005 WL 513501, at *3–*4 (D. Colo. 2005). The *Jordan* court also rejected the historical argument for such an exception, asserting that "the dying declaration exception was not in existence at the time the Framers designed the Bill of Rights," but it provided no support whatsoever for that assertion. *See Jordan*, 2005 WL at *4.

60. *See* Crawford v. Washington, 541 U.S. 36, 61–62 (2004).

61. *See Jordan*, 2005 WL 513501.

62. *See Mayhew*, 380 F. Supp. 2d at 970.

63. *See, e.g.*, People v. Gilmore, 828 N.E.2d 293, 302 (Ill. 2005) ("We believe that the reasoning of *Monterroso* represents the sensible approach and choose to follow it instead of *Jordan*."); Commonwealth v. Nesbitt, 892 N.E.2d 299, 310–12 (Mass. 2008) (describing *Jordan* as "an unpublished memorandum opinion" that "focused on whether dying declarations *ought* to be excluded from confrontation clause scrutiny as a matter of policy, rather than addressing whether such statements *are* excluded as a matter of preratification common law"); State v. Calhoun, 657 S.E.2d 424, 428 (N.C. 2008) (quoting, with approval, the *Gilmore* court's statement preferring the reasoning of *Monterroso* to that of *Jordan*).

64. The same problem can occur in the opposite direction: A state may narrowly define its exceptions to the hearsay rule so as to prevent the accused from being able to introduce evidence in his defense. Under these circumstances, the Supreme Court has held that a state will not be allowed to apply its hearsay rule so as to exclude evidence offered by the accused where to do so interferes with the accused's constitutional right to present witnesses in his own defense. *See* Chambers v. Mississippi, 410 U.S. 284, 302 (1973).

as well as post-*Crawford* precedent that provides support for this conclusion.

Numerous pre-*Crawford* U.S. Supreme Court and lower federal court decisions addressed the scope of various exceptions to the Confrontation Clause identified during that era. As discussed above, under *Roberts*, a hearsay statement was deemed "reliable" (and thus could overcome a Confrontation Clause objection) if it fell within a "firmly rooted" exception to the hearsay rule.[65] In *Roberts* itself, the Supreme Court identified dying declarations, cross-examined prior testimony, business records, and public records as examples of "firmly rooted" exceptions to the hearsay rule.[66] In subsequent decisions, the Supreme Court identified co-conspirator statements,[67] excited utterances,[68] and statements for medical diagnosis and treatments[69] as "firmly rooted" exceptions to the hearsay rule.

Yet *Roberts* did not simply allow the prosecution to avoid the Confrontation Clause simply by showing that a statement fell within the scope of a firmly rooted hearsay exceptions *as defined by the drafters of the hearsay exception at issue in the case.* Rather, to the extent that the drafters of a state or federal rule of evidence expanded its scope in a way that deviated from the historical, common law definition of the exception, courts would hold that the evidence at issue did *not* fall within a "firmly rooted" hearsay exception.

Thus, for example, in *Bourjaily v. United States*,[70] the U.S. Supreme Court followed the *Roberts* approach and held that the co-conspirator exception to the hearsay rule was a "firmly rooted" one, and therefore, such co-conspirator statements are admissible over a Confrontation Clause objection without the need to make a particularized showing of reliability.[71] Yet in so holding, the Court felt compelled to distinguish its earlier decision in *Dutton v. Evans*,[72] in which such a showing was required.[73] The Court did so by describing *Dutton* as standing for the proposition that a "reliability inquiry [is] required where [the] evidentiary rule deviates from [the]

65. *See supra* text accompanying notes 7, 8, 9, 10.
66. *See* Ohio v. Roberts, 448 U.S. 56, 66 n.8 (1980).
67. *See* Bourjaily v. United States, 483 U.S. 171, 183 (1987).
68. *See White v. Illinois*, 502 U.S. 346, 355 n.8 (1992).
69. *See id.*
70. *Bourjaily*, 483 U.S. at 171 (1987).
71. *Id.* at 183.
72. Dutton v. Evans, 400 U.S. 74 (1970).
73. *Id.* at 88–89.

common-law approach."[74] At issue in *Dutton* was Georgia's hearsay exception for co-conspirator statements, which unlike the federal hearsay exception, encompassed statements made during the concealment phase of a conspiracy.[75] Subsequently, the U.S. Court of Appeals for the Eleventh Circuit considered a Confrontation Clause challenge to a hearsay statement admitted under Georgia's hearsay exception for co-conspirator statements and harmonized the two decisions as follows:

> The *Bourjaily* Court held that statements which fall within the traditional common law co-conspirator exception to the hearsay rule are presumed to be sufficiently reliable to satisfy the trustworthiness prong of the Confrontation Clause. The Court, however, carefully pointed out that the presumption does not apply to those trials conducted in states that have not adopted the common law formulation of the exception. Specifically it noted, in dicta, that the formulation used in Georgia, which is the one at issue in the case at bar, is sufficiently different to mandate a case by case evaluation of the hearsay for indicia of reliability.[76]

The Eleventh Circuit went on to conclude that admission of the statement at issue violated the Confrontation Clause, notwithstanding the fact that the statement fell within the scope of Georgia's hearsay exception for co-conspirator statements.[77]

The Sixth Circuit has likewise held that statements admitted under Ohio's hearsay exception for co-conspirator statements, which also encompasses statements made during the concealment phase of a conspiracy, do not fall within a "firmly rooted" hearsay exception, and thus are not exempt from scrutiny under the Confrontation Clause.[78]

Numerous other courts applying the *Roberts* framework to state and federal versions of hearsay exceptions broader in scope than their common law counterparts have held that evidence admitted under such exceptions could not be deemed to fall within a "firmly rooted" hearsay exception (at least, to the extent that admissibility of the

74. *See Bourjaily*, 483 U.S. at 183.

75. *See Dutton*, 400 U.S. at 81.

76. *See* Horton v. Zant, 941 F.2d 1449, 1464 (11th Cir. 1991).

77. Horton v. Zant, 941 F.2d at 1465.

78. *See* Anthony v. DeWitt, 295 F.3d 554, 561–62 (6th Cir. 2002); Hill v. Brigano, 199 F.3d 833, 846 (6th Cir. 1999).

evidence at issue turned on that broader scope). Thus, even though the U.S. Supreme Court held, in *White v. Illinois*,[79] that the hearsay exception for statements for medical diagnosis and treatments was a "firmly rooted" one,[80] subsequent decisions held that evidence admitted under state and federal versions of that hearsay exception did not qualify as "firmly rooted" where they lack the traditional common law requirement that the declarant have a treatment-seeking motive[81] or where they encompass statements of fault (which were not embraced by the common law version of the exception).[82]

Similarly, although the hearsay exception for declarations concerning family history or pedigree is one of the oldest common-law hearsay exceptions, the common-law exception encompassed only statements made before the controversy arose; thus, statements admitted under the versions found in the Federal and Military Rules of Evidence, which have abolished this requirement, have been deemed not to fall within a "firmly rooted" hearsay exception.[83] Likewise, although dispositive documents and recitals in deeds fall within a firmly rooted hearsay exception, the broader, modern hearsay exception for statements affecting an interest in property (which includes, but is not limited to, dispositive documents and recitals in deeds) represents an expansion over the common law and has been deemed not to qualify as a "firmly rooted" hearsay exception.[84] And although the hearsay exception for prior consistent statements may qualify as a firmly rooted hearsay exception, a state version of that exception that lacks the common law requirement that the statement be made pre-motive would not.[85]

Finally, and perhaps most explicitly, when the U.S. Supreme Court considered whether statements admitted under Virginia's hearsay exception for statements against penal interest fell within a firmly rooted hearsay exception, it wrote in *Lilly v. Virginia*:[86]

79. White v. Illinois, 502 U.S. 346 (1992).

80. *See id.* at 355 n.8.

81. *See* State v. Massengill, 133 N.M. 263, 271–74 (N.M. 2002); State v. Hinnant, 351 N.C. 277, 286 (2000).

82. *See* Nelson v. Farrey, 874 F.2d 1222, 1234 (7th Cir. 1989) (Flaum, J., concurring).

83. *See* United States v. Groves, 23 M.J. 374, 376–77 (1987).

84. *See* United States v. Weinstock, 863 F. Supp. 1529, 1536–37 (D. Utah 1994).

85. *See* Jones v. Cain, 601 F. Supp. 2d 769, 805–06 (E.D. La. 2009). *See also* Tome v. United States, 513 U.S. 150, 156 (1995) (describing the common law requirement and reading it into the federal hearsay exception for prior consistent statements).

86. Lilly v. Virginia, 527 U.S. 116 (1999).

> We assume, as we must, that [the declarant's] statements were against his penal interest as a matter of state law, but the question whether the statements fall within a firmly rooted hearsay exception for Confrontation Clause purposes is a question of federal law.[87]

In addition to pre-Crawford decisions, two post-*Crawford* decisions addressing the existence of the dying declaration exception to the Confrontation Clause have raised but not decided the question whether there exists, as a matter of federal constitutional law, a static definition of a dying declaration. In *Commonwealth v. Nesbitt*,[88] the Supreme Judicial Court of Massachusetts, after concluding that there is a dying declaration exception to both the Confrontation Clause of the U.S. Constitution and its Massachusetts counterpart, observed that the state's modern version of the dying declaration exception was broader than the common law version of the exception.[89] Focusing on that breadth, it then stated:

> Because [the victim's] statement here qualifies under the narrower [common law] concept of a dying declaration, we need not address whether the dying declaration exception implicit in the Sixth Amendment and art. 12 [of the Massachusetts Constitution] extends to the boundaries of our current, expanded concept of dying declarations.[90]

Similarly, in *People v. Webb*, the accused contended that, even assuming that there exists a dying declaration exception to the Confrontation Clause, it encompasses only statements falling within the scope of the *common law* dying declaration exception, not California's statutory version of the exception.[91] Under the facts of the case, the *Webb* court found it unnecessary to decide whether California's statutory version of the dying declaration exception was broader than the common law exception, and if so, whether statements falling within the scope of the former qualified as an exception to the Confrontation Clause.[92]

87. *Id.* at 125 (emphasis added).
88. Commonwealth v. Nesbitt, 452 Mass. 236 (2008).
89. *Id.* at 249–51.
90. *Id.* at 252 n.17.
91. People v. Webb, 2008 WL 3906837, at *6–7 (Cal. 2008).
92. *Id.* at *7.

Implicit in both the *Nesbitt* and *Webb* opinions is a recognition that statements admitted under modern versions of the dying declaration hearsay exception that are broader than their common law counterpart may run afoul of the Confrontation Clause.[93] This, when coupled with the aforementioned precedents addressing the meaning of the phrase "firmly rooted" in the *Roberts* era, provides strong support for the commonsense conclusion that there exists a static definition of the phrase "dying declaration" as a federal constitutional matter.

Finally, a four-member dissenting opinion in the U.S. Supreme Court's most recent Confrontation Clause decision, *Melendez-Diaz v. Massachusetts*,[94] lends additional support for the proposition that there is a static definition of a dying declaration as a matter of federal constitutional law. In *Melendez-Diaz*, the majority held that before the results of a scientific test may be introduced into evidence the defendant has the right to confront the "analyst" who performed the test.[95] The dissent, focusing on the meaning of the term "analyst," wrote:

> One must assume that this term, though it appears nowhere in the Confrontation Clause, nevertheless has some constitutional substance that now must be elaborated in future cases.[96]

It would seem that the dissenters in *Melendez-Diaz* would agree that the term "dying declaration," which appears nowhere in the text of the Confrontation Clause (but which, like the term "analyst," must have *some* meaning in order for the Confrontation Clause to be given effect), has some "constitutional substance" that likewise will be elaborated in future cases. Nor is there reason to believe that the majority would disagree with the dissenters; although the majority opinion carefully responded to and refuted virtually all of the dissent's substantive disagreements with the majority opinion, it did not in any way counter the dissent on this particular point.

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93. *See* 7 Ia. Prac., Evidence § 5.804:2 n.5 (2008) ("Given the Court's strong insistence [in *Crawford*] on the importance of cross-examination of out-of-court testimonial declarations, the Court may not wish to extend the exception [for dying declarations] beyond its limited common law parameters.").

94. Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527 (2009).

95. *See id. at* 2532.

96. *See id.* at 2543 (Kennedy, J., dissenting).

III. The 'Dying Declaration' Exception to the Confrontation Clause: A Closer Look

Once one accepts the existence of a dying declaration exception to the Confrontation Clause of the U.S. Constitution with a static constitutional definition, one must then figure out which sources to look to in order to define the phrase "dying declaration." The answer to this question can be found scattered throughout the U.S. Supreme Court's opinion in *Crawford*. In *Crawford*, Justice Scalia scrutinized the meaning of the phrase "witnesses against" in the Confrontation Clause and focused his attention on a single source at a single point in time: the common law in 1791, the year in which the Sixth Amendment was ratified.[97]

Yet even if one embraces Justice Scalia's originalist form of constitutional interpretation, in which one defines constitutional terms by looking to historical sources to decipher the original meaning of the constitution,[98] one may nonetheless have a quibble with Justice Scalia's exclusive focus on the year 1791. After all, at issue in *Crawford* was the applicability of the Sixth Amendment's Confrontation Clause not to an arm of the federal government, but rather to the State of Washington.[99] And of course, the Sixth Amendment does not apply of its *own* force to the states, but rather only by means of "incorporation" via the Fourteenth Amendment.[100] Because the Fourteenth Amendment was not ratified until 1868, some critics of *Crawford* and the cases that have followed it have chided Justice Scalia for focusing exclusively on 1791 and not on 1868 to the extent that what is involved is the application of the Confrontation Clause to the states.[101]

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97. *See* Crawford v. Washington, 541 U.S. 36, 54 (2004) ("As the English authorities above reveal, the common law in 1791 conditioned admissibility of an absent witness's examination on unavailability and a prior opportunity to cross-examine. The Sixth Amendment therefore incorporates those limitations."); *id.* at 54 n.5 (refusing to consider a source cited in the concurring opinion because it "was decided a half century earlier ad cannot be taken as an accurate statement of the law in 1791"); *id.* at 58 n.8 ("It is questionable whether testimonial statements would ever have been admissible on that ground in 1791.").

98. *See generally* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

99. *See id.* at 38–42.

100. *See* Pointer v. Texas, 380 U.S. 400, 403–08 (1965).

101. *See, e.g.*, Tom Lininger, *The Sound of Silence: Holding Batterers Accountable for Silencing Their Victims*, 87 TEX. L. REV. 857, 877 (2009); Myrna Raeder, *Remember the Ladies and the Children Too:* Crawford's *Impact on Domestic Violence and Child Abuse Cases*, 71 BROOK. L. REV. 311, 311–12 (2005).

The Court in general and Justice Scalia in particular have been somewhat inconsistent in their approach to this issue. For example, when interpreting a provision of the Fourteenth Amendment as applied directly to the states (and not through incorporation of a provision of the Bill of Rights), Justice Scalia has focused on 1868.[102] And in the First Amendment context, Justice Scalia has, in dissent, focused on both 1791 and 1868 when interpreting the application of that Amendment to the states.[103] In contrast, a concurring opinion in that same case, penned by Justice Thomas, focused exclusively on 1791.[104] Moreover, in the Sixth Amendment context, Justice Scalia has in the past focused on both 1791 and 1868 when interpreting the application of that Amendment to the states via the Fourteenth Amendment.[105] Yet in the First Amendment context, Justice Scalia has more recently stated that "[t]he notion that incorporation empties the incorporated provisions of their original meaning has no support in either reason or precedent."[106]

Perhaps one way sensibly to harmonize the Court's decisions is to say that they focus on 1868 when considering the application of the Fourteenth Amendment *of its own force*, but focus instead on 1791 when considering the application of an incorporated provision of the Bill of Rights via the Fourteenth Amendment.[107] Such a harmonization has the virtue of giving constitutional principles a consistent meaning without regard to whether they are invoked against the federal government or the states, a principle that the Supreme Court has relied upon in other constitutional contexts.[108] Of course, such consistency can be achieved by making *either* 1791 *or* 1868 the operative date, but it seems more logical to assume that the

102. *See* Burnham v. Superior Court, 495 U.S. 604, 611 (1990).

103. *See* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 372–73 (1995) (Scalia, J., dissenting).

104. *See id.* at 358–71 (Thomas, J., concurring). *See generally* Mark Graber, *Antebellum Perspectives on Free Speech*, 10 WM. & MARY BILL RTS. J. 779, 799–800 (2002).

105. *See* Portuondo v. Agard, 529 U.S. 61, 65 (2000).

106. McCreary County, Ky. v. ACLU of Ky., 545 U.S. 844, 898 (2005).

107. *See* Hans W. Baade, *"Original Intent" in Historical Perspective: Some Critical Glosses*, 69 TEX. L. REV. 1001, 1025 n.150 (1991).

108. *See* Bolling v. Sharpe, 347 U.S. 497, 498–500 (1954) (reading "equal protection" principles applied under the Fourteenth Amendment into the due process clause of the Fifth Amendment, and reasoning that "In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government").

drafters of the original constitution and the Fourteenth Amendment had the common law of 1791 in mind during the drafting process than to assume that the drafters of the original constitution had in mind the future common law of 1868. In any event, there continues to be an active debate over whether 1791 or 1868 is the right focus when interpreting provisions of the Bill of Rights as applied to the states.[109]

In most cases, the choice between 1791 and 1868 may raise an interesting theoretical question, but in practical terms is irrelevant. Thus, for example, in *Giles*, Justice Scalia defined the scope of the forfeiture by wrongdoing exception to the Confrontation Clause while focusing his attention on 1791 but did not confine his focus to that period because he was able to conclude that the scope of the exception argued for by the state was "unheard of at the time of the founding or for 200 years thereafter."[110] In the case of the dying declaration exception, as will be demonstrated below, the choice of 1791 versus 1868 may be outcome determinative.

IV. The Common Law Dying Declaration Exception to the Hearsay Rule

For *most* of American history, dying declarations have been admissible in just one, narrow circumstance: When offered in homicide cases in which the death of the declarant is the subject of

109. *See* Ronald J. Allen, *Originalism and Criminal Law and Procedure*, 11 CHAP. L. REV. 277, 296 (2008); Sanford Levinson, *Superb History, Dubious Constitutional and Political Theory: Comments on Uviller and Merkel, the Militia and the Right to Arms*, 12 Wm. & Mary Bill Rts. J. 315, 316, 328–29 (2004); Stephen A. Siegel, *Injunctions for Defamation, Juries, and the Clarifying Lens of 1868*, 56 BUFF. L. REV. 655, 659–63 (2008); Andrew E. Taslitz, *Respect and the Fourth Amendment*, 94 J. CRIM. L. & CRIMINOLOGY 15, 42 & nn.142–43 (2003). Indeed, there is also a debate on the question whether the correct focus of originalism is on the original intent of the *drafters* or the original understanding of the *ratifiers*. *See* Michael Bhargava, *The First Congress Canon and the Supreme Court's Use of History*, 94 CAL. L. REV. 1745, 1763 (2006); Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 663 (2009); Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1134–48 (2003). Depending on the resolution of that debate, there is a further question whether to focus on 1791 and 1868 (the dates when the Bill of Rights and the Fourteenth Amendment, respectively, were ratified) or instead on 1789 and 1866 (the dates when they were drafted and forwarded to the states for ratification). *See generally* Akhil Reed Amar, *Heller, HLR, and Holistic Legal Reasoning*, 122 HARV. L. REV. 145, 173 (2008) (vacillating between a focus on 1789 and 1791); Thomas Y. Davies, *What Did the Framers Know, and When Did They Know It? Fictional Originalism in* Crawford v. Washington, 71 BROOK. L. REV. 105, 157–159 (2005).

110. Giles v. California, 128 S. Ct. 2678, 2693 (2008).

the charge.[111] Under this long-standing common law rule, dying declarations have not been admissible in civil cases, nor have they been admissible in any criminal case except for homicide.[112] Furthermore, under the common law rule, the dying declaration of victim A cannot be offered in a prosecution for the murder of victim B, even if both were killed in the same affray with the accused.[113] Indeed, where homicide was among several charges in an indictment, the accused could obtain, upon request, a limiting instruction that the evidence be admitted only for the homicide charge and not for the other charges.[114]

Implicit in the common law rule being limited to homicide cases in which the death of the declarant was the subject of the charge was a further requirement that the declarant must be dead,[115] a requirement explicitly stated by some common law courts.[116] In addition, the common law admitted dying declarations only if it were shown that the declarant believed her death to be impending when she made the statement.[117] Furthermore, under the common law rule,

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111. *See* People v. Huff, 339 Ill. 328, 332 (1930); Railing v. Commonwealth, 110 Pa. 100, 103 (1885); 5 WIGMORE, EVIDENCE §§1432–1433, at pp. 278–82 (Chadbourn rev. 1974).

112. *See* Milne v. Sanders, 228 S.W. 702, 708 (Tenn. 1921).

113. *See* Allsupp v. State, 72 So. 599, 601 (Ala. 1916); Holland v. State, 190 S.W. 104, 105–06 (Ark. 1916); Johnson v. State, 58 So. 540, 541 (Fla. 1912); Commonwealth v. Smith, 268 S.W. 346, 347 (Ky. 1925); State v. Fitzhugh, 2 Or. 227, 233 (1867); State v. Nist, 118 P. 920, 922 (Wash. 1911); Advisory Committee's Note to ALA. R. EVID. 804(b)(2).

114. *See* People v. Murawski, 117 N.E.2d 88, 91 (Ill. 1954).

115. *See* 7 Ia. Prac., Evidence § 5.804:2 (2008) ("Certainly, if usable only in a homicide prosecution, declarant was unavailable due to death."); 5 WIGMORE, *supra* note 111, at § 1435, p. 284; Advisory Committee's Note to ALA. R. EVID. 804(b)(2) ("The threshold requirement for the dying declaration at common law was that the declarant must have actually died.").

116. *See* Pulliam v. State, 6 So. 839, 840 (Ala. 1889); Kennecott Copper Corp. v. Industrial Comm'n, 420 P.2d 194, 197 (Ariz. 1966); Worthington v. State, 48 A. 355, 358 (Md. 1901); People v. Franklin, 245 N.W.2d 746, 748 (Mich. 1976); State v. Mills, 91 N.C. 581 (1884); Kilpatrick v. Commonwealth, 3 Phila. 237 (Pa. 1858); State v. Gazerro, 420 A.2d 816, 819 n.2 (R.I. 1980).

117. *See, e.g.*, State v. Nash, 7 Clarke 347 (Iowa 1858) ("[D]ying declaration . . . can only be given in evidence where they are made under a sense of impending death."); Donnelly v. State, 26 N.J.L. 463, 464 (1857); Brown v. State, 3 George 433 (Miss. 1856); Oliver v. State, 17 Ala. 587 (1850); State v. Moody, 3 N.C. 50 (1798) ("[T]hey must be the declarations of a dying man, of one so near his end that no hope for life remains . . . but if at the time of making the declarations he had reasonable prospects and hopes of life such declarations ought not to be received . . . for there is room to apprehend he may be actuated, by motives of revenge and an irritated mind, to declare what possibly may not be true."). Courts have interpreted this requirement to mean that a statement is inadmissible if the declarant expressed any hope of survival. *See* Shepard v. United States, 290 U.S. 96, 100 (1933); Morgan v. State, 31 Ind. 193, 194 (1869); Marshall v. Chicago & G.E. Ry. Co.,

only statements concerning the cause or circumstances of the declarant's death were admissible.[118]

A few jurisdictions in the United States continue to follow the common law rule today, either because they have not codified their evidence rules and thus continue to look to the common law to determine the admissibility of evidence[119] or because they have codified the common law dying declaration exception to the hearsay rule in their evidence codes.[120] However, in three significant ways, most versions of the dying declaration exception extant in the United States bear little resemblance to their common law predecessor.

First, most modern versions of the dying declaration exception to the hearsay rule allow for the admission of dying declarations in other types of cases than merely in homicide cases in which the death of the declarant is the subject of the charge.[121] The least significant deviation

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48 Ill. 475 (1868); Dixon v. State, 13 Fla. 636, 639 (1869); State v. Nash, 7 Clarke 347 (Iowa 1858); Robbins v. State, 8 Ohio St. 131 (1857); Bull v. Commonwealth, 14 Gratt. 613 (Va. 1857); State v. Moody, 3 N.C. 50 (1798); Rex v. Welbourn, 1 East P.C. 358, 359–60 (1792); Rex v. Woodcock, Leach Cr. Case 500, 502 (1789); 1 GREENLEAF, EVIDENCE § 158, at p. 189 (1st ed. 1842). Although a few decisions have suggested that a "nebulous ray of hope" or "a mere, faint, lingering hope of recovery" does not bar admission. *See* People v. Hubbs, 33 N.E.2d 289, 294–95 (Ill.1949); State v. Center, 35 Vt. 378 (1862) (citing People v. Anderson, 2 Wheeler's Crim. Cases 398). Moreover, it is not necessary that the person actually *say* that they are going to die; this can be inferred from the circumstances, such as where they are mortally wounded and in a condition that rendered almost immediate death inevitable, or from the fact that doctors and other attendants around the person thought him to be dying and so indicated to him. *See* Morgan v. State, 31 Ind. 193, 194 (1869); Dixon v. State, 13 Fla. 636, 639 (1869); People v. Sanchez, 24 Cal. 17, 23–25 (1864); State v. Gillick, 7 Clarke 287 (Iowa 1858); Kilpatrick v. Commonwealth, 3 Phila. 237 (1858); Donnelly v. State, 26 N.J.L. 463, 464 (1857); State v. Scott, 12 La. Ann. 274 (1857); McLean v. State, 16 Ala. 672 (1849); McDaniel v. State, 1 Morr. St. Cas. 336 (Miss. 1847); Hill v. Commonwealth, 2 Gratt. 594 (Va. 1845); Anthony v. State, 19 Tenn. (Meigs) 262, 262–63 (1838); Vass v. Commonwealth, 3 Leigh 786 (Va. 1831); Rex v. Woodcock, Leach Cr. Case 500, 503 (1789); 1 GREENLEAF, EVIDENCE § 158, at pp. 188–89 (1st ed. 1842); 5 WIGMORE, *supra* note 111, at § 1442, pp. 295–301.

118. *See* Hackett v. People, 54 Barb. 370 (N.Y. 1866); State v. Center, 35 Vt. 378 (1862); Mose v. State, 35 Ala. 421 (1860); State v. Shelton, 2 Jones (NC) 360 (N.C. 1855); Johnson v. State, 17 Ala. 618 (1850); Rex. v. Mead, 107 Eng. Rep. 509, 2 B. & C. 605, 608 (1824); 5 WIGMORE, *supra* note 111, at § 1434, pp. 282–84.

119. *See, e.g.*, People v. Nieves, 492 N.E.2d 109, 112–114 & n.3 (N.Y. 1986); People v. Cox, 172 N.E. 64, 66 (Ill. 1930).

120. *See, e.g.*, CONN. CODE OF EVID. § 8-6(2).

121. Nonetheless, a few states continue to follow the common law rule in this regard. *See* CONN. CODE OF EVID. § 8-6(2) & Commentary to CONN. CODE OF EVID. § 8-6(2) ("by demanding that 'the death of the declarant [be] the subject of the charge,' Section 8-6 (2) retains the requirement that the declarant be the victim of the homicide that serves as the basis for the prosecution in which the statement is offered."); People v. Cox, 172 N.E.

from the common law rule expands it slightly to allow the dying declaration of victim A to be offered in a prosecution for the murder of victim B when both were killed in the same affray with the accused.[122] More significant deviations allow dying declarations to be admitted in civil cases in addition to homicide cases,[123] while the most significant deviations place no limits whatsoever on the types of cases in which they may be admitted, thus allowing them to be admitted in civil and criminal cases alike.[124] The drafters of such expanded

64, 66 (Ill. 1930); People v. Nieves, 492 N.E.2d 109, 112–14 & n.3 (N.Y. 1986); State v. Hodge, 655 S.W.2d 738, 742 (Mo. 1983).

122. *See* Commonwealth v. Key, 381 Mass. 19, 26 (1980). *See also* TENN. R. EVID. 804(b)(2) & 2009 Advisory Commission Comment to TENN. R. EVID. 804(b)(2) ("The revised language makes admissible a dying declaration even though the declarant is not the victim of the homicide being prosecuted. The exception would apply, for example, where there were multiple victims but the prosecutions were severed."); Advisory Committee's Note to ALA. R. EVID. 804(b)(2) (noting that, by expanding the rule to cover all criminal cases, it deviates from the common law, which made the statements of victim A inadmissible in the prosecution for victim B's murder).

123. *See* FED. R. EVID. 804(B)(2); ARIZ. R. EVID. 804(B)(2); 6 GUAM CODE ANN. § 804(B)(2); IDAHO R. EVID. 804(B)(2); MICH. R. EVID. 804(B)(2); MINN. R. EVID. 804(B)(2) & Committee Comment to MINN. R. EVID. 804(B)(2); MISS. R. EVID. 804(B)(2); N.H. R. EVID. 804(B)(2) & Reporter's Notes to N.H. R. EVID. 804(B)(2); N. MAR. I. R. EVID. 804(B)(2); OHIO R. EVID. 804(B)(2) & Staff Notes to OHIO R. EVID. 804(B)(2); 12 OKLA STAT. ANN. § 2804(B)(2) & Evidence Subcommittee's Note to 12 OKLA STAT. ANN. § 2804(B)(2); R.I. R. EVID. 804(B)(2); S.C. R. EVID. 804(B)(2) & Notes to S.C. R. EVID. 804(B)(2); VT. R. EVID. 804(B)(2); WASH. R. EVID. 804(B)(2); W. VA. R. EVID. 804(B)(2); WYO. R. EVID. 804(B)(2).

124. *See* ALASKA R. EVID. 804(B)(2) & Commentary to ALASKA R. EVID. 804(B)(2); ARK. R. EVID. 804(B)(2); *See* CAL. EVID. CODE § 1242 & Law Revision Commission Comment to CAL. EVID. CODE § 1242; COLO. REV. STAT. ANN. § 13-25-119(1); DEL. R. EVID. 804(B)(2); Comment to DEL. R. EVID. 804(B)(2); FLA. STAT. ANN. § 90.804(2)(B) & Law Revision Council Note to FLA. STAT. ANN. § 90.804(2)(B); HAW. R. EVID. 804(B)(2) & Commentary to HAW. R. EVID. 804(B)(2); IND. R. EVID. 804(B)(2); IOWA R. EVID. 804(B)(2) & Official Comment to IOWA R. EVID. 804(B)(2); KAN. STAT. ANN. § 60-460(E); KY. R. EVID. 804(B)(2); LA. CODE EVID. ART. 804(B)(2) & Comments to LA. CODE EVID. ART. 804(B)(2); ME. R. EVID. 804(B)(2) & Advisory Committee's Note to ME. R. EVID. 804(B)(2); MONT. R. EVID. 804(B)(2); NEB. REV. STAT. § 27-804(2)(B); NEV. REV. STAT. § 51.335; N.M. R. 11-804(B)(2); N.C. R. EVID. 804(B)(2) & Commentary to N.C. R. EVID. 804(B)(2); N.D. R. EVID. 804(B)(2); OR. REV. STAT. ANN. §40.465(3)(B); Conference Committee Commentary to OR. REV. STAT. ANN. §40.465(3)(B); PA. R. EVID. 804(B)(2) & Comment to PA. R. EVID. 804(B)(2); P.R. ST. T.32 AP. IV, R. 64(B)(2); TEX. R. EVID. 804(B)(2); UTAH R. EVID. 804(B)(2) & Advisory Committee's Note to UTAH R. EVID. 804(B)(2); 5 V. I. CODE § 932(5); WIS. STAT. § 908.045(3) & Judicial Council Committee's Note to WIS. STAT. § 908.045(3). Some jurisdictions, while expanding the exception so as to admit them in all criminal cases, nonetheless continue to bar their admission in civil cases. *See* ALA. R. EVID. 804(b)(2) & Advisory Committee's Note to ALA. R. EVID. 804(b)(2). New Jersey's exception is also applicable only in criminal cases, *see* N.J. R. EVID. 804(b)(2), but in civil cases, virtually any statement made by a deceased person is admissible under a different hearsay exception, *see* N.J. R. EVID. 804(b)(6);

versions of the exception reasoned that if dying declarations are sufficiently trustworthy to be admitted when the stakes are as high as they are in a homicide case, there is no reason to exclude them in civil cases or in other types of criminal cases in which the stakes are lower.[125]

Second, although a few jurisdictions continue to impose the requirement that the declarant *actually die*,[126] most modern versions of the dying declaration exception to the hearsay rule have eliminated this requirement. Rather, it suffices that the declarant be "unavailable" in one of a variety of ways, including being dead[127] (one

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Comment to N.J. R. EVID. 804(b)(2). By contrast, Maryland admits them in all civil cases but only in selected types of criminal cases. *See* MD. R. EVID. 5-804(b)(2) (admissible "[i]n a prosecution for an offense based upon an unlawful homicide, attempted homicide, or assault with intent to commit a homicide"). South Dakota admits them in all civil cases and all prosecutions for manslaughter or murder; it also allows them to be admitted in any case when offered by the accused. *See* S.D. STAT. §§ 19-16-31, 23A-22-12.

125. *See* Commentary to ALA. R. EVID. 804(b)(2) ("once the balance is struck in favor of admission where the penalty is greatest, there is no reason to distinguish among classes of cases. It is difficult to defend the argument that dying declarations are more necessary in a homicide case than in an abortion prosecution."); Law Revision Commission Comment to CAL. EVID. CODE § 1242 ("there is no rational basis for differentiating between civil and criminal actions or among various types of criminal actions."); Law Revision Council Note to FLA. STAT. ANN. § 90.804(2)(b) ("While the common law recognized the exceptional need for the evidence in homicide cases, it is not logical to limit it to those cases. The rationale of admissibility applies equally in civil cases and in prosecutions for crimes other than homicide."); Commission Comments to MONT. R. EVID. 804(b)(2) ("if statements of this sort are reliable enough for use in criminal prosecutions, then they should also be used in civil cases where the outcome does not involve personal freedom."); Comment to PA. R. EVID. 804(b)(2) ("If a dying declaration is trustworthy enough to be introduced against a defendant charged with murder, it is trustworthy enough to be introduced against a defendant charged with attempted murder, robbery, or rape. It is also trustworthy enough to be introduced against a party in a civil case.").

126. *See* COLO. REV. STAT. ANN. § 13-25-119(1) (referring to the dying declarations of a "deceased person"); KAN. STAT. ANN. § 60-460(e); 5 V.I. CODE § 932(5); People v. Nieves, 492 N.E.2d 109, 113 & n.3 (N.Y. 1986).

127. *See* FED. R. EVID. 804(A), 804(B)(2) & Advisory Committee's Note to FED. R. EVID. 804(B)(2); ALA. R. EVID. 804(A), 804(B)(2) & Advisory Committee's Note to ALA. R. EVID. 804(B)(2); ALASKA R. EVID. 804(A), 804(B)(2) & Commentary to ALASKA R. EVID. 804(B)(2); ARIZ. R. EVID. 804(A), 804(B)(2); ARK. R. EVID. 804(A), 804(B)(2); DEL. R. EVID. 804(A), 804(B)(2); Comment to DEL. R. EVID. 804(B)(2); FLA. STAT. ANN. §§ 90.804(1), (2)(B) & Law Revision Council Note to FLA. STAT. ANN. § 90.804(2)(B); 6 GUAM CODE ANN. §§ 804(A), 804(B)(2); HAW. R. EVID. 804(A), 804(B)(2); IDAHO R. EVID. 804(A), 804(B)(2); IND. R. EVID. 804(A), 804(B)(2); IOWA R. EVID. 804(A), 804(B)(2) & Official Comment to IOWA R. EVID. 804(B)(2); KY. R. EVID. 804(A), 804(B)(2); LA. CODE EVID. ART. 804(A), 804(B)(2) & Comments to LA. CODE EVID. ART. 804(B)(2); ME. R. EVID. 804(A), 804(B)(2) & Advisory Committee's Note TO ME. R. EVID. 804(B)(2); MD. R. EVID. 5-804(A), 5-804(B)(2); MICH. R. EVID. 804(A), 804(B)(2); MINN. R. EVID. 804(A), 804(B)(2); MISS. R. EVID. 804(A), 804(B)(2); MONT. R. EVID. 804(A), 804(B)(2); NEB. REV. STAT. §§ 27-804(1), 27-804(2)(B); NEV. REV. STAT. § 51.335;

state, California, has dispensed with any sort of showing of unavailability[128]). The expansion of the definition of a dying declaration to include declarants who survive goes hand-in-hand with the decision to expand the *types* of cases in which dying declarations are admissible: once one decides to include anything other than a homicide case in which the declarant's death is the subject of the charge, it is no longer the case that the declarant will *necessarily* be dead. The drafters of such modern versions of the exception reasoned that the reliability of dying declarations comes not from the *fact* of death but rather the declarant's *belief* that he would die.[129] Although the declarant's death provided a necessity justification for admitting dying declarations at common law, the drafters of these modern versions of the exception reasoned that necessity likewise exists in other common situations in which the declarant is unavailable.[130]

Third, although most jurisdictions in the United States retain the common law requirement that only statements that concern the cause or circumstances of the declarant's impending death (or what he

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N.H. R. EVID. 804(A), 804(B)(2) & Reporter's Notes to N.H. R. EVID. 804(B)(2); N.J. R. EVID. 804(A), 804(B)(2); N.M. R. 11-804(A), 11-804(B)(2); N.C. R. EVID. 804(A), 804(B)(2) & Commentary to N.C. R. EVID. 804(B)(2); N.D. R. EVID. 804(A), 804(B)(2); N. MAR. I. R. EVID. 804(A), 804(B)(2); OHIO R. EVID. 804(A), 804(B)(2); 12 OKLA. STAT. ANN. §§ 2804(A), 2804(B)(2); OR. REV. STAT. ANN. §§ 40.465(1), 40.465(3)(B); Conference Committee Commentary to OR. REV. STAT. ANN. §40.465(3)(B); PA. R. EVID. 804(A), 804(B)(2); P.R. ST. T.32 AP. IV, R. 64(A), 64(B)(2); R.I. R. EVID. 804(A), 804(B)(2); S.C. R. EVID. 804(A), 804(B)(2) & Notes to S.C. R. EVID. 804(B)(2); S.D. STAT. § 19-16-31; TEX. R. EVID. 804(A), 804(B)(2); UTAH R. EVID. 804(A), 804(B)(2); VT. R. EVID. 804(A), 804(B)(2); WASH. R. EVID. 804(A), 804(B)(2); W. VA. R. EVID. 804(A), 804(B)(2); WIS. STAT. §§ 908.04, 908.045(3) & Judicial Council Committee's Note to WIS. STAT. § 908.045(3); WYO. R. EVID. 804(A), 804(B)(2).

128. *See* CAL. EVID. CODE § 1242; Minutes of the California Law Revision Commission (March 17–18, 2005), at 11; Eileen A. Scallen & Glen Weissenberger, California Evidence 2009 Courtroom Manual (LexisNexis 2009). *Compare id.* § 1230 (specifying unavailability as a requirement for admitting statements against interest). *See also* Miguel A. Méndez, *Hearsay and Its Exceptions: Conforming the Evidence Code to the Federal Rules*, 37 U.S.F. L. REV. 351, 391–92 (2003) ("Under the Code, the proponent does not have to establish the declarant's unavailability as a condition of admissibility.").

129. *See* Reporter's Notes to N.H. R. EVID. 804(b)(2) ("[T]he declarant need not be dead, merely unavailable (his belief of impending death at the time of the statement is sufficient)."); Comment to N.J. R. EVID. 804(b)(2) ("[A] statement made by a victim which otherwise meets all of the stipulations of the rule is no less reliable and trustworthy because the victim has survived.").

130. *See* Comment to N.J. R. EVID. 804(b)(2) ("The committee recognizes, moreover, that because of medical advances, victims may survive under physical disabilities precluding testimonial capacity.").

believed to be his impending death) are admissible,[131] eight jurisdictions (New Hampshire,[132] Colorado,[133] Kansas,[134] Nevada,[135] New Jersey,[136] Puerto Rico,[137] Utah,[138] and the Virgin Islands[139]) impose

131. *See* FED. R. EVID. 804(B)(2); ALA. R. EVID. 804(B)(2) & Advisory Committee's Note to ALA. R. EVID. 804(B)(2); ALASKA R. EVID. 804(B)(2) & Commentary to ALASKA R. EVID. 804(B)(2); ARIZ. R. EVID. 804(B)(2); ARK. R. EVID. 804(B)(2); CAL. EVID. CODE § 1242; CONN. CODE OF EVID. § 8-6(2) & COMMENTARY TO CONN. CODE OF EVID. § 8-6(2); DEL. R. EVID. 804(B)(2) & Comment to DEL. R. EVID. 804(B)(2); FLA. STAT. ANN. § 90.804 (2)(B) & Law Revision Council Note to FLA. STAT. ANN. § 90.804(2)(B); GA. CODE ANN. § 24-3-6; 6 GUAM CODE ANN. § 804(B)(2); HAW. R. EVID. 804(B)(2); IDAHO R. EVID. 804(B)(2); IND. R. EVID. 804(B)(2); IOWA R. EVID. 804(B)(2) & Official Comment to IOWA R. EVID. 804(B)(2); KY. R. EVID. 804(B)(2); LA. CODE EVID. ART. 804(B)(2); ME. R. EVID. 804(B)(2) & Advisory Committee's Note to ME. R. EVID. 804(B)(2); MD. R. EVID. 5-804(B)(2); MICH. R. EVID. 804(B)(2); MINN. R. EVID. 804(B)(2); MISS. R. EVID. 804(B)(2); MONT. R. EVID. 804(B)(2); NEB. REV. STAT. § 27-804(2)(B); N.M. R. 11-804(B)(2); N.C. R. EVID. 804(B)(2); N.D. R. EVID. 804(B)(2); N. MAR. I. R. EVID. 804(B)(2); OHIO R. EVID. 804(B)(2); 12 OKLA. STAT. ANN. § 2804(B)(2); OR. REV. STAT. ANN. §40.465(3)(B) & Conference Committee Commentary to OR. REV. STAT. ANN. §40.465(3)(B); PA. R. EVID. 804(B)(2); R.I. R. EVID. 804(B)(2); S.C. R. EVID. 804(B)(2); S.D. STAT. §§ 19-16-31, 23A-22-12; TEX. R. EVID. 804(B)(2); VT. R. EVID. 804(B)(2); WASH. R. EVID. 804(B)(2); W. VA. R. EVID. 804(B)(2); WIS. STAT. § 908.045(3) & Judicial Council Committee's Note to WIS. STAT. § 908.045(3); WYO. R. EVID. 804(B)(2); People v. Tilley, 406 Ill. 398, 403-04 (1950); People v. Becker, 215 N.Y. 126, 145 (1915).

132. *See* Reporter's Notes to N.H. R. EVID. 804(b)(2) ("In civil cases, however, the exception is not limited to statements concerning the circumstances or cause of the anticipated death.") Note that this statement in the Reporter's Notes is inconsistent with the plain text of the exception itself, which limits it to statements "concerning the cause or circumstances of what the declarant believed to be impending death." *See* N.H. R. EVID. 804(b)(2).

133. *See* COLO. REV. STAT. ANN. § 13-25-119(1); Barbara E. Bergman and Nancy Hollander, 7 Wharton's Criminal Evidence § 94:7 (15th ed.) (noting that the Colorado rule does not provide that "the statements are not limited to those concerning the cause or circumstances of the impending death as does the federal rule"); Martin D. Litt, *Dying Declarations*, 27 COLO. LAW. 49 (1998) ("Colorado's dying declaration statute does not condition admissibility on the subject matter of the statement. The Federal Rule, on the other hand, limits admissibility to those dying declarations that concern the 'cause or circumstances of what the declarant believed to be his impending death.'").

134. *See* KAN. STAT. ANN. § 60-460(e); Michael A. Barbara, 3 Kan. Law & Prac., Guide Kan. Evid. § 7:7 (4th ed.) ("In the federal rule, the statement must concern the cause or circumstances of the death; not so in Kansas.").

135. *See* NEV. REV. STAT. § 51.335; Barbara E. Bergman and Nancy Hollander, 7 Wharton's Criminal Evidence § 94:30 (15th ed.) ("The Nevada statute also does not require that the statement concern 'the cause or circumstances of what the declarant believed to be impending death.'").

136. *See* N.J. R. EVID. 804(b)(2); Comment to N.J. R. EVID. 804(b)(2) ("[T]his rule . . . covers all statements made by a declarant voluntarily and in good faith while believing his death is imminent . . . . The federal rule analogue, Rule 804(b)(2), limits admissible dying declarations to statements concerning the cause or circumstances of declarant's perceived imminent death . . . .").

no such limit on the types of statements encompassed by the exception. Rather, many of these states put in place of that limit a requirement that the judge find that the statement was made "in good faith."[140] The provision for the judge finding the statement was made "in good faith" is patterned on the 1953 Uniform Rules of Evidence, which likewise did not limit the scope of the exception to statements concerning the "cause or circumstances" of the declarant's death but that did impose a requirement that the judge find the statements to be made in good faith.[141]

If the U.S. Supreme Court uses the above-described common law version of the dying declaration hearsay exception to define the scope of the dying declaration exception to the Confrontation Clause, three types of situations in which broader, modern versions of the hearsay exception are applied would run afoul of the Confrontation Clause. The first situation would be when the statement is offered against the accused in a criminal case where a crime other than the homicide of the declarant is the subject of the charge. The second situation would be when the declarant is not dead (a situation that could arise only to the extent one was applying the exception to crimes in which the death of the declarant was not the subject of the charge). And the third situation would be when the statements admitted under the exception were not limited to the cause or circumstances of the declarant's impending death.

All three of these situations are in play in the opening hypothetical involving the admission into evidence of a shooting victim's statement in criminal prosecutions in state courts in Utah for attempted murder and bank robbery. Utah's version of the dying declaration exception to the hearsay rule applies in all types of cases,

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137. *See* P.R. LAWS ANN. tit. 32A § IV, R. 64(A) (1979).

138. *See* UTAH R. EVID. 804(b)(2); Advisory Committee's Note to Utah R. Evid. 804(b)(2) ("not limited to declarations concerning the cause or circumstances of the impending death . . . ."); Barbara E. Bergman and Nancy Hollander, 7 Wharton's Criminal Evidence § 94:46 (15th ed.) ("In addition, it does not contain the requirement that the statement concern "the cause or circumstances of what the declarant believed to be impending death," as is found in the federal rule."); Ronald N. Boyce & Edward L. Kimball, *Utah Rules of Evidence 1983—Part III*, 1995 UTAH L. REV. 717, 808 (1995) ("The statement must, of course, be relevant to the litigation, but unlike the common law and Federal Rule, use of the statement is not limited to proof of the cause or circumstances of the believed impending death.").

139. *See* 5 V.I. CODE § 932(5).

140. *See* N.J. R. EVID. 804(b)(2); Utah R. EVID. 804(b)(2); 5 V.I. CODE § 932(5); Piper v. Fickett, 312 A.2d 698, 699 (N.H. 1973).

141. *See* UNIF. RULE OF EVID. 63(5) (1953).

civil and criminal alike; it does not require that the declarant be dead, merely that he be unavailable; and it is not limited to statements that concern the cause or circumstances of the declarant's death (or what he believed to be his death).[142] In the hypothetical, the evidence is being offered in a non-homicide case; the declarant is alive, albeit unavailable; and (at least the statement regarding the bank robbery) is unrelated to the cause or circumstances of what David believed to be his impending death. Accordingly, for three different reasons, the evidence offered by the prosecution in the hypothetical may be subject to exclusion on Confrontation Clause grounds.

Although the Federal Rules of Evidence and most state versions of the dying declaration exception to the hearsay rule do not contain *all* three of the major deviations from the common law found in Utah's version of the exception, nearly all of them incorporate at least one or more of these deviations. Accordingly, under certain factual circumstances, evidence offered under nearly *any* version of the dying declaration exception to the hearsay rule extant in the United States today may run afoul of the Confrontation Clause.

That is, so long as what I have described above is in fact the relevant common law dying declaration exception to the hearsay rule. Although virtually every case one reads will so describe the scope of the common law exception, and although what I have described above no doubt was the scope of the exception for most of the nineteenth and twentieth centuries (including in 1868, when the fourteenth Amendment was ratified), the *early* common law definition—that extant in 1791, when the Sixth Amendment was ratified—may in fact be somewhat *broader.* The sections that follow will explore the scope of the common law rule on three axes: the "type of case" limitation, the "cause or circumstances" limitation, and the requirement that the declarant be dead.

A. The 'Type of Case' Limitation

According to nearly all respected modern evidence treatises[143] and numerous twentieth century judicial opinions[144] and other

142. *See* UTAH R. EVID. 804(a), 804(b)(2).

143. *See* 5 WIGMORE, *supra* note 111, at § 1431, pp. 277–78; CHARLES T. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 260, at 557 (1954).

144. *See* United Services Auto. Ass'n v. Wharton, 237 F. Supp. 255, 258 (D.C.N.C. 1965) ("Until about 1800 . . . . [n]o distinction was made between civil and criminal cases."); People v. Smith, 214 Cal. App. 3d 904, 911 n.4 (1989) (noting that originally, the exception was not limited to homicide cases, but it was only through subsequent judicial

reputable sources,[145] *early* common law decisions (those through around 1800) did not, in fact, limit the admissibility of dying declarations to homicide cases in which the death of the declarant was the subject of the charge. Rather, so long as the declarant was dead and believed his death to be imminent when he made the statement, the statement could be admitted in any case, civil or criminal. Rather, it was only in the early 1800s that common law decisions in both the United States[146] and England[147] narrowed the exception's applicability to homicide cases in which the death of the declarant was the subject of the charge.

What caused the switch? Wigmore blamed it on a misconstruction of the words of an early treatise writer that took on a life of its own.[148] The passage from the 1803 treatise, Edward Hyde East's *Pleas of the Crown*, stated in relevant part as follows:

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construction that its scope was narrowed); People v. Nieves, 492 N.E.2d 109, 113 (N.Y. 1986) ("Although originally the use of dying declarations was not limited to particular types of cases, by the early 19th century common-law courts had begun to restrict their use to homicide prosecutions . . . ."); Blair v. Rogers, 89 P.2d 928, 930 (Okla. 1939) (noting that at early common law, dying declarations were admissible in all civil and criminal cases); Hansel v. Commonwealth, 84 S.W.2d 68, 69 (Ky. 1935) ("At early common law, dying declarations were admitted in all cases, civil and criminal. It was later held that they should be received only in prosecutions for homicide, and then only where the death of the declarant was the subject of the charge and the circumstances of the death were the subject of the declaration."); McCredie v. Comm'l Casualty Ins. Co., 142 Or. 229, 231 (1933); Clark v. State, 211 N.W. 16 (Neb. 1926) ("At the early common law, dying declarations were admissible in all cases, civil or criminal. Later a distinction was evolved and such declarations were received only in homicide cases."); Thurston v. Fritz, 138 P. 625, 626 (Kan. 1914) (noting that up until about 1800, there was no distinction made between civil and criminal cases).

145. *See, e.g.*, Law Revision Council Note to FLA STAT. § 90.804(2)(b) ("This simple rationale of dying declarations sufficed the courts up to the beginning of the eighteen hundreds, and these declarations were admitted in civil and criminal cases without distinction and seemingly without untoward results.").

146. *See, e.g.*, Wilson v. Boerem, 15 Johns. 286 (N.Y. 1818).

147. *See, e.g.*, *Rex v. Lloyd*, 132 Eng. Rep. 684, 4 C. & P. 233 (1830) (holding dying declaration inadmissible in a robbery case, concluding that they are admissible only for those charges where the death of the deceased person who made the declaration is the subject of the inquiry); Rex v. Mead, 107 Eng. Rep. 509, 2 B. & C. 605 (1824) (holding dying declaration inadmissible in perjury prosecution, concluding that they are admissible only where the death of the deceased is the subject of the charge); Rex v. Hutchinson, 107 Eng. Rep. 510, 2 B. &. C. 608 n.a (1822) (holding dying declaration inadmissible in prosecution for administering savin to a pregnant woman with intent to procure abortion, reasoning that even though the declaration related to the cause of death, such statements are admissible only when the death of the party is the subject of the inquiry).

148. *See* 5 WIGMORE, *supra* note 111, at § 1431, pp. 277–78 (citing Serjeant East, 1 Pleas of the Crown 353 (1803)). *Accord Wharton*, 237 F. Supp. at 258 n.4.

> Besides the usual evidence of guilt in general cases of felony, which is elsewhere treated of, there is one kind of evidence *more peculiar to the case of homicide*, which is the declaration of the deceased after the mortal blow, as to the fact itself, and the party by whom it was committed. Evidence of *this sort* is admissible *in this case* on the fullest necessity; for it often happens that there is no third person present to be an eye-witness to the fact; and the usual witness on occasion of *other felonies*, namely, the party injured himself, is gotten rid of.[149]

Indeed, it was in reliance on this passage that the New York Court of Appeals, in an 1818 decision in *Wilson v. Boerem*,[150] overturned a lower court decision admitting a dying declaration in a civil case.[151] The New York high court, focusing on the italicized portions of the passage above (italics added by the court and not contained in the treatise itself), read it to support the proposition that such declarations were admissible in homicide cases *only*.[152] Of course, "[a] careful reading of this statement will reveal that the author only intended to convey the thought that such statements are used *more frequently* in homicide cases because often the only witness to the crime is the victim and he is now dead."[153] Nonetheless, thereafter, high courts in other states cited *Wilson* for the proposition that dying declarations were admissible in homicide cases only.[154]

Perhaps some of the confusion was created by the *Wilson* court's addition of the following statement at the end of the above-quoted passage that:

> Whatever might have been the ground on which this kind of evidence was first admitted, in the case of homicide, we find it has long been an established rule in such cases, and I may say, in such cases only.[155]

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149. *See* EDWARD HYDE EAST, 1 A TREATISE OF THE PLEAS OF THE CROWN § 124, at 353 (1803) (emphasis added).

150. *See* Wilson v. Boerem, 15 Johns. 286 (N.Y. 1818).

151. *See id.* (overturning Wilson v. Boerum, 1816 WL 1617 (N.Y. 1816)).

152. *See id.*

153. *See* MCCORMICK, *supra* note 143, at § 260, p. 557; C.D. Todd, Jr., Comment, *Proposed Extension of the Dying Declaration Exception to the Hearsay Rule*, 2 MO. L. REV. 201, 204 (1937).

154. *See* Daily v. New York & N.H.R. Co., 32 Conn. 356 (1865); Marshall v. Chicago & G.E. Ry. Co., 48 Ill. 475 (1868).

155. *See Wilson*, 15 Johns. 286.

To a reader of the New York decision, this passage would appear to be a continuation of its quote from East's treatise, but an examination of the treatise itself shows that this passage was not there, and thus that the "I" refers to the author of the court decision, and not the treatise.[156] Yet the confusion has resulted in other legal writers citing this additional statement as though it were a part of the early treatise.[157]

Another culprit, according to Wigmore,[158] was Judge Isaac F. Redfield, who, after taking on the role of editing Simon Greenleaf's treatise on evidence law made the following addition:

> It is not received upon any other ground than that of necessity, in order to prevent murder going unpunished. What is said in the books about the situation of the declarant, he being virtually under the most solemn sanction to speak the truth, is far from presenting the true ground of the admission, for if that were all that is requisite to render the declaration evidence, the apprehension of death should have the same effect. But both must concur, both the fact and the apprehension of being *in extremis*. And, although it is not indispensible that there should be no other evidence of the same facts, the rule is, no doubt, based upon the presumption, that in the majority of cases there will be no other equally satisfactory proof of the same facts. This presumption and the consequent probability of the crime going unpunished, is unquestionably the chief ground of this exception in the Law of Evidence. And the great reason why it could not be received generally, as evidence in all cases where the facts involved should thereafter come in question.[159]

This addition was made in a footnote to the text of the treatise, which clearly set forth the rule as it had developed in the United States in the early 1800s:

> It was at one time held, by respectable authorities, that this general principle warranted the admission of dying declarations in all cases, civil and criminal; but it is now well settled that they are admissible, as such, only in cases of homicide "where the death of the deceased is the subject of the charge, and the

156. *See* EAST, *supra* note 149, § 124, at 353.

157. *See* George S. Ryan, *Dying Declarations in Civil Actions*, 10 B.U. L. REV. 470, 471–72 & n.9 (1930).

158. *See* 5 WIGMORE, *supra* note 111, at §1432, p. 278.

159. *See* 1 GREENLEAF, EVIDENCE § 156, at p. 182 n.1 (12th ed. 1866).

> circumstances of the death are the subject of the dying declarations."[160]

To some extent, Wigmore may be making too much of Judge Redfield's footnote, since the main text of the treatise, which said much the same thing, was the same as it had been since the first edition of the treatise in 1842.[161] Nonetheless, whether it was the text or the footnote that was the driving force of persuasion, this section from Greenleaf's treatise was likewise cited by various common law courts in support of the proposition that dying declarations were admissible only in homicide prosecutions in which the death of the declarant was the subject of the charge.[162]

At the same time, a parallel modification in the early common law rule was taking place in England. First, in 1820, the court in *Doe d. Sutton v. Ridgway*,[163] rejected a dying declaration offered in a civil ejectment action. This was followed in 1824 by *Rex. v. Mead*,[164] which held inadmissible a dying declaration in a perjury prosecution and set forth what has for most of the nineteenth and twentieth centuries been the common law rule:

> [E]vidence of this description is only admissible where the death of the deceased is the subject of the charge, and the circumstances of the death the subject of the declaration.[165]

So what support can be found in *original* sources for the proposition that dying declarations were admissible in more than just homicide cases in which the death of the declarant was the subject of the charge at early common law? Both direct and implied support for this proposition can be found in five decisions issued between 1752 and 1805 and a pair of treatises from the turn of the eighteenth century.

First, in the 1752 trial of James Macgregor and in the 1753 trial of Robert Macgregor for the abduction and forcible marrying of Jean

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160. *See id.* at 181–82.

161. *See* 1 GREENLEAF, EVIDENCE § 156, at p. 186 (1st ed. 1842).

162. *See* Haley v. State, 99 Ark. 356 (1911); Morgan v. State, 31 Ind. 193 (1869); Taylor v. Commonwealth, 94 S.E. 795, 797 (Va. 1918); Foley v. State, 72 P. 627, 629 (Wyo. 1903); People v. Davis, 56 N.Y. 95 (1874).

163. Sutton v. Ridgway, 4 B. & Ald. 53, 55 (1820).

164. Rex. v. Mead, 2 B. & C. 605 (1824).

165. *Id.* at 608.

Key, the court admitted Ms. Key's dying declarations.[166] David Hume, writing his *Commentaries on the Law of Scotland Respecting Trial for Crimes* in 1800, cited these cases for the proposition that "[a]lthough, from their nature, cases of murder are the most frequent, they are not however the only cases, in which this sort of evidence may be employed."[167] This was followed by a pair of civil cases in which dying declarations were admitted into evidence. The first of these, a 1761 decision in *Wright v. Littler*,[168] held admissible a dying declaration in an ejectment action that turned on whether a will was forged or genuine.[169] And the second case, an 1805 decision in *Aveson v. Lord Kinnaird*,[170] held admissible a dying declaration in an action brought by a husband on an insurance policy on the life of his wife that turned on whether the wife was healthy or ill when the policy was purchased (and in which the court cited for support an earlier decision by Justice Heath admitting a dying declaration by an attesting witness that he had forged a bond).[171] In his 1810 treatise, Zephaniah Swift, citing *Aveson*, wrote that "[i]n civil cases, the rule of receiving as evidence the dying declarations of a person *in extremis*, has also been adopted, and on the same principle as in criminal cases."[172]

Less direct support for this proposition can be found in a pair of cases from the late eighteenth century in which dying declarations were *not* admitted. In the first of these, *Rex v. Welbourn*,[173] the court refused to admit a dying declaration in a prosecution for an illegal abortion, and in the second one, *Rex v. Drummond*,[174] the court refused to admit a dying declaration in a prosecution for robbery. In *neither* case, however, did the court mention that the statements were inadmissible because the cases were not homicide cases; rather, the dying declaration in *Welbourn* was excluded because the court concluded that the declarant did not believe her death to be imminent when she made the statement, and in *Drummond* the dying

166. *See* HUME, *supra* note 42.

167. *See id.*

168. Wright v. Littler, 3 Burr. 1244 (1761).

169. *Id.* at 1255 ("The declaration of Medlicott in his last illness, when he produced and delivered it for the use of the plaintiff, is allowed to be competent and material evidence.").

170. Aveson v. Lord Kinnaird, 6 East 188 (1805).

171. *Id.* (citing *Wright v. Littler* to support proposition that dying declaration is admissible).

172. *See* Zephaniah Swift, A DIGEST OF THE LAW OF EVIDENCE 125 (1810).

173. Rex v. Welbourn, 1 East P.C. 358, 359–60 (1792).

174. Rex v. Drummond, 1 Leach 337 (1784).

declaration was excluded because the declarant, a convicted felon, would have been incompetent to testify had he survived. Accordingly, these two cases are significant not so much for what they held, but rather for what they omitted. Finally, as early as 1743, litigants made arguments in legal proceedings for limiting the types of cases in which dying declarations were admissible. The arguments distinguished between civil and criminal cases, contending they were admissible only in the latter. But no one argued that they should be limited exclusively to *homicide* cases.[175]

The only early source that arguably points in the opposite direction is a treatise from the mid-1700s that cites an unpublished 1720 decision whose holding the treatise summarized as follows: "[i]n the case of murder, what the deceased declared after the wound given, may be given in evidence."[176] Although one could read this to stand for the proposition that dying declarations were thus *only* admissible in murder cases,[177] the treatise itself does not state it in the form of a limitation on the scope of the exception, but rather as a description of the case in which the issue arose and what the court held with regard to admissibility. In other words, the treatise appears to be reporting, in digest form, that in a murder case, the court held that the deceased's declaration made after the fatal wound was given may be received into evidence; it is not stating that such statements may *only* be received in such cases.

If the history of the dying declaration exception is as I have described it, it has important implications for testing the constitutionality of modern versions of the dying declaration exception to the hearsay rule. The trajectory of the dying declaration exception in England and the United States started out broad (in that it could be invoked in all civil and criminal cases), narrowed by means of common law decisions in the 1800s (perhaps more specifically between 1806 and 1874),[178] and then broadened again (primarily

175. *See* Annesley v. Anglesea, 17 How. St. Tr. 1140, 1161 (1743). *Accord* Note, *Dying Declarations as Evidence in Civil Suits*, 27 HARV. L. REV. 739, 739–40 n.6 (1914).

176. 12 Charles Viner, GENERAL ABRIDGMENT OF LAW AND EQUITY, at 118–19.

177. *See generally* Thomas Y. Davies, *Not "the Framers' Design": How the Framing Era Ban Against Hearsay Evidence Refutes the* Crawford-Davis *"Testimonial" Formulation of the Scope of the Original Confrontation Clause*, 15 J. L. & Pol'y 349, 412–14 (2007).

178. *See* Thurston v. Fritz, 138 P.2d 625, 626–27 (Kan. 1914); Notes of Cases, *Dying Declarations*, 1 AM. L. J. 366, 366–67 (1884). During this period, common law decisions were in a state of transition between the original and the modified common law rule. For example, the Supreme Court of North Carolina, writing in 1815, found no reason to exclude dying declarations in civil cases, see M'Farland v. Shaw, 4 N.C. 200 (1815),

through legislative action) in the late twentieth century. The more recent broadening of the scope of the exception, rather than being characterized as a deviation from the common law rule (as some modern decisions, unaware of the early common law history, do),[179] may thus better be described as "restor[ing] the dying declaration exception to its original common law scope."[180] Indeed, it is for this reason that the Supreme Court of Kansas, writing in 1914, overturned the limitation on admitting dying declarations to homicide cases in which the death of the declarant was the subject of the charge, reasoning that to do so was consistent with the original scope of the exception.[181] If all of this is true, then the recent legislative deviations from the common law, rather than presenting probable violations of the Confrontation Clause, are consistent with the scope of the confrontation right as it was understood at the time the Sixth Amendment was ratified.

But how did the early nineteenth century decisions in both the United States and England navigate their way around decisions such as *Wright* and *Aveson*, which clearly were not homicide cases? In *Wilson*, the New York high court distinguished *Wright* by pointing to the fact that the court there noted that the testimony came out on the defense's own examination of the witness, and that they made no objection to it[182]—a sort of "waiver" explanation of the case. The New York high court distinguished *Aveson* by saying that it stood for the proposition that the statements by the wife regarding her ill health were admissible as a form of cross-examination of the surgeon who testified that, based on her statements to him during his

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although it subsequently overturned the decision during that period, see Barfield v. Britt, 47 N.C. 41 (1854).

179. *See* State v. Satterfield, 457 S.E.2d 440, 447–48 (W. Va. 1995) ("At common law the dying declaration exception only applied when the declarant was the murder victim. However, the adoption of the rules of evidence has broadened the common law."); State v. Scholl, 661 A.2d 55, 59 (R.I. 1995) ("Rule 804(b)(2), adopted in 1987, expanded the common-law circumstances for the admissibility of a dying declaration, which had limited the exception to criminal cases where the declarant's death had actually occurred."); FED. R. EVID. 804(b)(2) advisory committee's note ("The exception is the familiar dying declaration of the common law, expanded somewhat beyond its traditional narrow limits.").

180. *See* United Services Auto. Ass'n v. Wharton, 237 F. Supp. 255, 258 (W.D.N.C. 1965). *Accord* People v. Smith, 214 Cal. App. 3d 904, 911 n.4 (2d Dist. 1989) (describing federal and state codification of the rules of evidence as having "reenlarged" the scope of the dying declaration exception).

181. *See Thurston*, 138 P. at 626.

182. *See* Wilson v. Boerem, 15 Johns. 286 (N.Y. 1818).

examination of her, she was in a good state of health.[183] In *Ridgway*, the court distinguished *Aveson* itself by characterizing the declarations admitted there as being part of the *res gestae*,[184] and it distinguished the subscribing witness scenario cited in *Aveson* by saying that, had the subscribing witness been alive, he could have been impeached on cross-examination with his statements regarding the forging of the bond, and that the other party should not be disadvantaged from doing so because of his death.[185] In other words, the *Ridgway* court seemed to hold that the statements were admitted not as dying declarations, but rather either under a different exception to the hearsay rule or for a non-hearsay purpose. Finally, in *Mead*, the court distinguished the case before it from both *Wright* and the part of the *Aveson* opinion in which it referenced an earlier case involving a dying declaration by the attesting witness by pointing out that in those prior cases, "the declaration amounted to a confession by the party himself of a very heinous offence which he had committed," while the statement offered in the instant case was offered "for the purpose not of accusing, but of clearing himself," and thus was self-serving in nature.[186] In other words, the *Mead* court seemed to effectively be holding that the statements in *Wright* and *Aveson* were admitted *not* as dying declarations, but under a different principle (according to some sources, as a statement against interest).[187]

Accordingly, a slightly different read of this history says that these early sources provide only indirect support for the proposition that dying declarations were admissible in all types of cases, and that, at best, one can say that there was "no settled practice . . . of admitting such declarations outside of homicide cases."[188] Why, then, did the early treatise writers so confidently state that dying

183. *See id.*

184. *See* Sutton v. Ridgway, 4 B. & Ald. 53, 55 (1820). *Accord* Wooten v. Wilkins, 39 Ga. 223 (1869). At common law, the phrase "res gestae" encompassed what today is encompassed by multiple different hearsay exceptions (those for present sense impressions, excited utterances, statements of present bodily condition, and statements of emotions and present mental condition), as well as certain things that were technically not hearsay, such as verbal acts. *See* Polelle, *supra* note 25, at 294 n.24; 6 WIGMORE, EVIDENCE § 1768, at 257–58 (Chadbourn rev. 1976); Edmund M. Morgan, *A Suggested Classification of Utterances Admissible as Res Gestae*, 31 Yale L.J. 229 (1922).

185. *See id.*

186. *See* Rex. v. Mead, 2 B. & C. 605, 607–08 (1824).

187. *See* Note, *supra* note 175, at 7–8, 739–40; Wooten v. Wilkins, 39 Ga. 223 (1869).

188. *See id.* at 739–40.

declarations were admissible in civil and criminal cases alike? An early twentieth century treatise provides a plausible explanation:

> Some of the earlier text-writers . . . interpreted the rule as to dying declarations as applying to civil as well as criminal cases. This arose from the fact that the early cases where such declarations were offered were cases involving charges of homicide, and it was construed as a general doctrine, but the courts, upon having the question presented to them and not finding any actual precedent for civil cases, drew the line very strictly and held that such declarations were receivable in criminal cases only, and this is now the well-settled rule.[189]

Whatever uncertainty there may be regarding the scope of the common law rule at the time the Sixth Amendment was ratified, by the time the Fourteenth Amendment was adopted, it was quite clear that common law courts throughout the United States had accepted the narrower definition of the dying declaration exception to the hearsay rule—to wit, that such statements are admissible only in homicide cases.[190] The only two published decisions to hold otherwise in the United States were issued in 1815[191] and 1816,[192] and those were overturned, respectively, in 1854[193] and 1818.[194] Moreover, courts in the United States did not retreat to the early common law definition until 1914.[195] Thus, between 1854 and 1914 no "live" precedents in the United States held that dying declarations were admissible in any cases other than homicide cases. Accordingly, to the extent that 1868 (and not 1791) is the operative date for interpreting the scope of the exception to the Confrontation Clause right, modern versions of the dying declaration exception likely run afoul of the Sixth Amendment, even if they track the early common law.

Moreover, some mid-nineteenth century courts applied an even more narrow reading, holding that dying declarations were admissible

189. 1 BYRON K. ELLIOTT & WILLIAM F. ELLIOTT, A TREATISE ON THE LAW OF EVIDENCE 463 (1904).

190. *See* Wooten v. Wilkins, 39 Ga. 223 (1869); Marshall v. Chi. & G.E. Ry. Co., 48 Ill. 475 (1868); State v. Maitremme, 14 La. Ann. 830 (1859); Brown v. State, 3 George 433 (Miss. 1856); State v. Shelton, 2 Jones (N.C.) 360 (N.C. 1855); McDaniel v. State, 1 Morr. St. Cas. 336 (Miss. 1847).

191. M'Farland v. Shaw, 4 N.C. 200 (1815).

192. *See* Wilson v. Boerem, 1816 WL 1617 (N.Y. 1816).

193. *See* Barfield v. Britt, 47 N.C. 41 (1854).

194. *See* Wilson v. Boerem, 15 Johns. 286 (N.Y. 1818).

195. *See* Thurston v. Fritz, 138 P.2d 625 (Kan. 1914).

only in those homicide cases in which the death of the declarant is the subject of the charge.[196] Yet on this latter point, the decisions were not of one mind, and it is thus unclear whether the limitation of the dying declaration exception to homicide cases *in which the death of the declarant was the subject of the charge* has ever really been the accepted common law rule. In other words, the common law rule is unclear as to whether the dying declaration of victim A can be offered in a prosecution for the murder of victim B if both were killed in the same affray with the accused.

A number of common law courts in the United States, including several from around the time the Fourteenth Amendment was ratified, held that where multiple homicides result from one felonious act, the dying declaration of one victim is admissible to prove the homicides of the other common victims.[197] These decisions relied on *Rex v. Baker*,[198] an English common law decision from 1837 where the defendant was tried for the murder of John King by poison contained in a cake that King ate. In this case, the prosecution offered into evidence the dying declaration of his maid-servant, who was poisoned by the same incident.[199] In *Baker*, the court held that "as it was all one transaction, the declarations were admissible."[200] Accordingly, if the 1791 definition applies, dying declarations are admissible in such scenarios, and if the 1868 definition applies, it is at the very least an open question.

As a practical matter, however, in *most* instances it may not matter whether the broader 1791 or the narrower 1868 definition applies. Even assuming that the 1791 definition applies (and that it is as broad as I suggest), to the extent that the common law rule in 1791 also required that the declarant be dead *and* that the statement must concern the cause or circumstances of the declarant's impending death, there are few situations in which that would occur yet the

196. *See* Dixon v. State, 13 Fla. 636 (1869); Hudson v. State, 43 Tenn. 355 (1866); Daily v. N.Y. & N.H.R. Co., 32 Conn. 356 (1865); Moses v. State, 35 Ala. 421 (1860); Walston v. Commonwealth, 16 B. Mon. 15 (Ky. 1855); Barfield v. Britt, 2 Jones (N.C.) 41 (N.C. 1854); Lambeth v. State, 1 Cushm. 322 (Miss. 1852); State v. Cameron, 2 Pin. 490 (Wis. 1850); Oliver v. State, 17 Ala. 587 (1850).

197. *See* Commonwealth v. Key, 381 Mass. 19, 26 (1980); State v. Bohan, 15 Kan. 407 (1875); Brown v. Commonwealth, 73 Pa. 321 (1873); State v. Wilson, 23 La.Ann. 558 (1871); State v. Terrell, 12 Rich. 321 (S.C. 1859). *See also* 1 GREENLEAF, *supra* note 161, at § 156, pp. 186–87 n.2 (citing Rex v. Baker, 2 Mood. & Rob. 53 (1837)).

198. Rex v. Baker, 2 Mood. & Rob. 53 (1837).

199. Rex v. Baker, 2 Mood. & Rob. 53 (1837).

200. *See id.* at 54.

death of the declarant would *not* be the subject of the charge. Nonetheless, a few such instances do exist.

One such situation, which resulted in some of the first modifications of the common law rule by statute,[201] was that in which the dying declaration of a woman who died while having an illegal abortion performed on her could be admitted in a prosecution for illegal abortion brought against the individuals who performed it. At issue in such cases was the question whether such cases were prosecutions for homicide in which the death of the declarant was the subject of the charge.

Early English and Canadian authorities held such evidence inadmissible on the ground that they were not such cases. For example, an 1822 decision in *Rex v. Mead*[202] refused to admit the dying declaration of the woman on whom an abortion was performed, holding that even though the declaration at issue related to the cause of death, such statements are admissible only when the death of the party is the subject of the inquiry (an implicit finding that an abortion prosecution was not such a case).[203] To the same effect was the 1860 decision by the Canadian Supreme Court in *Regina v. Hind*.[204]

U.S. courts were divided on the question of whether dying declarations were admissible in prosecutions for illegal abortion under the common law dying declaration exception. One of the earliest courts in the U.S. to address this issue was the New York Court of Appeals in *People v. Davis*.[205] In a prosecution for performing an illegal abortion on a woman, the *Davis* court held that declaration by the woman was not admissible as a dying declaration. The *Davis* court reasoned that it was neither a prosecution for homicide in any degree nor was the death of the declarant a necessary element of the charge because the specific provision under which the defendant was convicted required only that the woman *or* the fetus

201. *See, e.g.*, Mass. Gen. L. c. 233 § 64; *Cummings v. Ill. Cent. R. Co.*, 364 Mo. 868, 881 (1954) (citing a since repealed statute); People v. Becker, 215 N.Y. 126, 145 (1915) (citing a since repealed statute); 5 WIGMORE, *supra* note 111, at § 1432, p. 281.

202. Rex v. Mead, 2 B. & C. 608 note (a).

203. *Id.*

204. Regina v. Hind, 8 Cox. C.C. 300, 300–02 (1860). A 1792 English decision refused to admit such evidence, but on the stated ground that the declarant did not believe her death to be imminent when she made the statement. *See* Rex v. Welbourn, 1 East P.C. 358, 359–60 (1792). The court made no mention of the fact that it was a non-homicide case, perhaps because at that point in time the common law had not narrowed the exception's applicability to homicide prosecutions.

205. People v. Davis, 56 N.Y. 95 (N.Y. 1874).

dies.[206] The court further reasoned that under the statute, the death of either one only increased the degree of the crime and the punishment inflicted because the statute at issue made it a crime of a lesser degree even if death of neither the woman nor the fetus resulted.[207] In contrast, the Wisconsin Supreme Court in *State v. Dickinson*[208] distinguished *Davis*, *Hutchinson* and *Hind*, reasoning that in Wisconsin, unlike in the jurisdictions that adjudicated those decisions, the conduct at issue was prosecuted as manslaughter. Thus, the court held that the prosecution was one for homicide.[209]

In *Montgomery v. State*,[210] the Supreme Court of Indiana distinguished *Davis* on a different ground than did the Wisconsin Supreme Court in *Dickinson*. Under the statute at issue in Indiana, the state imposed a criminal penalty if an abortion was performed on a woman and it resulted in either the death of the woman or the miscarriage of the fetus.[211] The *Montgomery* court first distinguished *Davis* on the ground that, under the New York statute, it was still a crime even absent the death of the woman or the miscarriage of the fetus, while under the Indiana statute it can be a crime only if the death of the woman or the miscarriage of the fetus occurred.[212] Furthermore, the court reasoned that because the indictment charged the death of the woman (and not the miscarriage of the fetus), the death of the declarant was necessarily the subject of the charge, since a conviction could not occur without proving that point.[213] The court ultimately held that whether something qualified as a homicide case should not turn on the fact that the statute under which the accused was charged either does not give a name to the offense or refers to it as an offense other than "murder" or "manslaughter." According to the *Montgomery* court, what matters instead is whether the elements

206. *See id.*

207. *See id.* Several subsequent decisions cited *Davis* with approval. *See, e.g.*, Railing v. Commonwealth, 110 Pa. 100 (1885); State v. Harper, 35 Ohio St. 78, 79–80 (1878).

208. State v. Dickinson, 41 Wis. 299 (1877).

209. *See id.*

210. Montgomery v. State, 80 Ind. 338 (1881).

211. *See id.*

212. *See id.* For like reasons, it also distinguished *Regina v. Hind* and *State v. Harper*, both of which involved laws in which death was not an element of the offense, but rather merely performing an abortion on a woman was the offense.

213. Montgomery v. State, 80 Ind. 338 (1881).

of felonious homicide—an unlawful act and death resulting from it—are present.[214]

One U.S. decision attempted to resolve the conflict among these cases by describing it as "more apparent than real."[215] This court reasoned that reconciling this conflict turns largely on the statutory language punishing the conduct at issue: "under one class of statutes, the offense is punishable whether death occurs or not, and in the other class the crime defined is not committed unless death ensues as a result of the operation."[216]

A second situation in which a statement by a deceased declarant describing the cause or circumstances of their impending death could be offered in a case in which the death of the declarant is not the subject of the charge would be one in which the accused was on trial for sexual assault (including statutory rape and forcible sodomy) of the deceased, and the deceased died shortly thereafter. For example, in *Hansel v. Commissioner*,[217] the accused, a man over twenty-one years of age, was tried for "carnally knowing" a female under sixteen years of age.[218] The young woman died shortly thereafter as a result of giving birth to a child. Believing her death to be imminent, the woman indicated that the accused impregnated her and, consequently, was responsible for her pending death.[219] However, although the woman's statements concerned the cause or circumstances of her death and were made when she believed her death to be imminent, the court held the statement inadmissible because her death was not the subject of the charge.[220] Other courts issued similar decisions applying the narrower version of the common law rule.[221]

A third situation in which a statement by a deceased declarant describing the cause or circumstances of their impending death could

214. *See id.*

215. Edwards v. State, 112 N.W. 611, 613 (Neb. 1907).

216. *Id.*

217. Hansel v. Comm'r, 84 S.W.2d 68 (Ky. 1935).

218. *Id.* at 68.

219. *Id.*

220. *Id.* at 69.

221. *See, e.g.*, Clark v. State, 211 N.W. 16, 16 (Neb. 1926); Haley v. State, 138 S.W. 631, 631 (Ark. 1911); Johnson v. State, 50 Ala. 456 (1874). *See also* Advisory Committee's Note to Fed. R. Evid. 804(b)(2) ("Thus, declarations by victims in prosecutions for other crimes, e.g. a declaration by a rape victim who dies in childbirth . . . were outside the scope of the [common law] exception"). A similar rationale was applied to civil actions brought by parents for the seduction of their minor child. *See* Wooten v. Wilkins, 39 Ga. 223 (1869).

be offered in a case in which the death of the declarant is not the subject of the charge would be one where the accused *attempts* to kill the declarant but is unsuccessful in doing so. Shortly thereafter, the declarant dies for unrelated reasons—e.g., he was run over by a bus or killed by a third person.[222] This scenario would fall outside the scope of the narrower 1868 version of the common law rule (since the declarant did not die as a result of the attempted murder, and thus his death is not the subject of the charge,[223] and also because "attempted murder" does not qualify as a homicide case[224]). But it would fall within the scope of the broader, 1791 definition, since that is not limited to homicide cases in which the death of the declarant is the subject of the charge.

A final situation that is analogous to the abortion and rape cases is a case where the accused is charged with arson which results in the death of an individual. In *Burton v. State*,[225] an Alabama appellate court acknowledged that such declarations were not admissible in rape cases but ruled to admit them in this case. The court drew an analogy to abortion cases which had held that death was the subject of the charge, reasoning that death was a component of the charge for first-degree aggravated arson.[226]

B. The 'Cause or Circumstances' Limitation

In contrast to the vast legal scholarship regarding the "type of case" limitation, few scholars have examined the roots of the "cause or circumstances" limitation. The earliest case Wigmore cites for the cause or circumstances limitation is an 1849 Alabama decision.[227] This stands in sharp contrast to his section dealing with the "type of case" limitation, in which Wigmore cites English as well as early American cases.[228] The Alabama decision in turn relies on the same case that ushered in the revised common law rule so far as the "type of case"

222. *See, e.g.*, State v. Moye, 765 So. 2d 1103, 1104, 1106–07 (La. 2000).

223. *See, e.g.*, State v. Banks, 271 S.W.3d 90, 112, 115 & n.12 (Tenn. 2008).

224. *See* Paul Bergman, *Teaching Evidence the "Reel" Way*, 21 QLR 973, 990–91 (2003); David Crump, *The Case for Selective Abolition of the Rules of Evidence*, 35 Hofstra L. Rev. 585, 654 (2006).

225. Burton v. State, 101 So. 2d 564 (Ala. 1957).

226. *Id.* at 570–71 (citing *Montgomery v. State*, 80 Ind. 338; *State v. Meyer*, 65 N.J.L. 237).

227. *See* 5 WIGMORE, *supra* note 111, at § 1434, p. 282 n.1 (citing *McLean v. State*, 16 Ala. 672 (1849)).

228. *Compare id.* at §§ 1430–31, pp. 275–78.

limitation is concerned, the 1824 English decision in *Rex. v. Mead*,[229] where the court held inadmissible a dying declaration offered in a perjury prosecution. The *Mead* holding thus established that dying declarations are admissible only where "the circumstances of the death [are] the subject of the dying declaration."[230]

But it is unclear whether there ever existed a "cause or circumstances" limitation prior to *Rex. v. Mead*, or whether that limitation was invented for the first time in that case. For example, in the 1761 civil case of *Wright v. Littler*,[231] the court deemed admissible a dying declaration that was not at all related to the cause or circumstances of the declarant's death; rather, it was related to the validity of someone's will.[232] Additionally, in the 1784 case *Rex v. Drummond*,[233] the court refused to admit a dying declaration of a convicted felon on the verge of execution. The accused's statement indicated that he committed the crime for which he was being tried, but the court did not reject it on the ground that the statement was unrelated to the cause or circumstances of the declarant's death. Instead, the court excluded this statement because the declarant, as a convicted felon, would have been incompetent to testify had he survived.[234] And the court made no mention whatsoever of any such limitation in its seminal decision of *Rex v. Woodcock* in 1789.[235] Furthermore, in the 1805 decision of *Aveson v. Lord Kinnaird*, the court cited with approval an earlier decision by Justice Heath that admitting a dying declaration by an attesting witness that he had forged a bond, even though the declaration had no relationship whatsoever with the cause or circumstances of the declarant's death.[236] On the other hand, in *William Higson's Case*, decided in 1785, one of the judges described the dying declaration exception as applying to "a person who conceives himself to be in a dying condition, *as to the author of the injury he has received*," with the italicized language

229. Rex. v. Mead, 2 B. & C. 605 (1824).
230. *See id.* at 608.
231. Wright v. Littler, 3 Burr. 1244 (1761).
232. *See id.* at 1247.
233. Rex v. Drummond, 1 Leach 337 (1784).
234. *See id.* at 337–38.
235. Rex v. Woodcock, Leach Cr. Case 500 (1789).
236. Aveson v. Lord Kinnaird, 6 East 188, 360 (1805).

being a reference, and thus arguably a limitation to, statements regarding the cause of the deceased's death.[237]

Despite the dearth of early common law cases referencing the "cause or circumstances" limitation, a few early treatises appear to so limit the scope of the exception. For example, Edward Hyde East's 1803 *Pleas of the Crown* (the same treatise blamed by Wigmore for providing the genesis for the "type of case" limitation), could be read to so limit the scope of the dying declaration exception. East's treatise describes a dying declaration as a "declaration of the deceased after the mortal blow, *as to the fact itself, and the party by whom it was committed.*"[238] Indeed, the United State Supreme Court cited this sentence of the treatise in an 1892 decision in which it described the scope of the hearsay exception.[239] Other scholars such as David Hume described as admissible dying declarations "with respect to the manner and guilt of his death."[240] Greenleaf, although quoting the language in *Mead*, does so in the context of discussing the "type of case" limitation; he does not discuss separately the issue of cause or circumstances in his treatise.[241]

The earliest American common law decision referencing the "cause or circumstances" limitation is the 1818 decision by the New York Court of Appeals in *Wilson v. Boerem*,[242] which was also the first American decision that limited the exception to homicide cases. In support of this proposition, the New York court relied on Edward Hyde East's 1803 treatise.[243]

Certainly, William Shakespeare did not consider the "cause or circumstances" limitation when he penned such works as *Richard II* and *The Life and Death of King John*, both of which have been cited as providing the early roots for the dying declaration exception to the hearsay rule.[244] In neither of those works did the dying declarations at

237. *See* Thomas Y. Davies, *Selective Originalism: Sorting Out Which Aspects of* Giles's *Forfeiture Exception to Confrontation Were or Were Not "Established at the Time of the Founding"*, 13 Lewis & Clark L. Rev. 605, 637 & nn.152–154 (2009) (quoting *William Higson's Case*, Old Bailey Session Papers (April 6, 1785, # 415), at 536, 539)).

238. *See* EAST, *supra* note 149, at § 124, p. 353 (emphasis added).

239. *See* Mattox v. U.S., 146 U.S. 140, 151 (1892).

240. *See* 2 HUME, *supra* note 42, at 227.

241. *See* 1 GREENLEAF, *supra* note 161, at § 156, p. 186.

242. Wilson v. Boerem. 15 Johns. 286 (N.Y. 1818).

243. *See id.* (citing 1 East's C.L. 353).

244. *See* 5 WIGMORE, *supra* note 112, at 1438 & n.1, at p. 289 (quoting *The Life and Death of King John*, Act V, sc. 4); United Services Auto. Ass'n v. Wharton, 237 F. Supp. 255, 258 n.3 (W.D.N.C. 1965) (citing *The Life and Death of King John*); State v. Lewis, 235

issue refer to the cause or circumstances of the declarant's impending death: In *The Life and Death of King John*, the declaration made by Melun to Salisbury, Pembroke, and Bigot is a warning regarding their safety and is unrelated to his death.[245] And in *Richard II*, the dying declaration by Gaunt to Richard II has nothing whatsoever to do with his own death, but rather consists of advice to Richard as well as a statement implicating Richard in the death of another person.[246]

Based on this precedent, the evolution of the "cause or circumstances" limitation illustrates that it developed side-by-side with, and thus to some extent has its fate tied to, the "type of case" limitation and the precedents on either side of that issue. Moreover, under most circumstances, a fact pattern that does not satisfy the "type of case" limitation will (save for the scenarios described at the end of the previous sub-section) likewise not satisfy the "cause or circumstances" limitation, making the "cause or circumstances" requirement to some extent surplusage.

This large degree of overlap notwithstanding, there is nonetheless a rational reason why the common law limited the scope of dying declarations to those that concern the cause or circumstances of the declarant's impending death (or what he believed to be his death): The limitation increases assurances that the statement was trustworthy when made. The less related the statement is to the immediate cause or circumstances of the declarant's death, the greater the risk of faulty memory (since such statements undoubtedly refer to events more remote in time) and the greater and the risk of insincerity (in that, the less related the statement is to the cause or circumstances of their death, the greater the possibility that there has been time for reflection and thus, the risk of mendacity).[247]

S.W.3d 136, 148 n.8 (Tenn. 2007) (citing *The Life and Death of King John*); Ellis v. State, 558 So.2d 826, 829 & n.3 (Miss. 1990) (citing *The Life and Death of King John* and describing dying declarations as being "[a]rguably of Shakespearian origin"); People v. Smith, 263 Cal. Rptr. 155, 157 (1989) (quoting *Richard II*, Act II, sc. 1); State v. Mitchner, 256 N.C. 620, 630 (1962) (citing *The Life and Death of King John*); People v. Gezzo, 307 N.Y. 385, 393 (1954) (citing *The Life and Death of King John*); Sims v. State, 36 S.W. 256, 258 (Tex. 1896) (citing *The Life and Death of King John*).

245. *See* WILLIAM SHAKESPEARE, THE LIFE AND DEATH OF KING JOHN, act 5, sc. 4. *Accord Wisconsin v. Jensen*, Case No. 02 CF 0314, State of Wisconsin, Circuit Court, Kenosha County, Memorandum Regarding the Dying Declaration, at 8 (April 7, 2008).

246. *See* William Shakespeare, *Richard II,* Act II, sc. 1.

247. *See* JOHN W. STRONG ET AL., MCCORMICK ON EVIDENCE § 311, at pp. 310–11 & n.14 (5th ed. 1999); 5 WEINSTEIN'S FEDERAL EVIDENCE §804.05[5][b], at p. 804–50.3 (2d. ed. 1997 & Supp. 2009) (noting that this limitation lessens the danger of fabrication); Christopher B. Mueller & Laird C. Kirkpatrick, 5 FEDERAL EVIDENCE § 8:124 (3d ed.

Another rationale for the "cause or circumstances" limitation is that it provides a roundabout way of assuring that the declarant believed his death to be imminent when he made the statement (the one common law requirement that neither the courts nor the drafters of modern versions of the dying declaration have ever retracted). A person on the verge of death will likely be focused exclusively on the cause of their death. Thus, the less related the statement is to the cause or circumstances of the person's death, the less assurance is provided that the person believed her death to be imminent when she made the statement. For similar reasons, the limitation may also provide an alternative way to assure that the declarant spoke from personal knowledge.[248] While it seems likely that she would have personal knowledge of the cause or circumstances of her own death, fewer natural assurances indicating that she had personal knowledge of other matters about which she spoke exist.

As indicated above, eight jurisdictions in the United States have eliminated the "cause or circumstances" requirement as an element of their hearsay exceptions for dying declarations. Yet, in its stead, a number of these jurisdictions have added a requirement that the judge find that the declarant made the statement "in good faith." To the extent that the root historical, common law purpose of the "cause or circumstances" requirement was to assuage concerns regarding the trustworthiness of a dying declaration or the personal knowledge of the declarant, the "good faith" inquiry may suffice. That is because a finding by the court that the declarant made the statement in "good faith" may negate a concern that they were engaging in calculated dishonesty, that they did not believe their death to be imminent when they made the statement, and that they lacked personal knowledge of the matters about which they spoke.

No case law exists that interprets the phrase "good faith" as used in modern versions of the dying declaration exception that eliminate the "cause or circumstances" requirement. However, there is case law interpreting the phrase "good faith" as used in hearsay exceptions

2007) ("[I]t can be said that memory and perception are not likely to be serious risks with dying statements relating to the cause or circumstances of death."); *Moses v. State*, 35 Ala. 421 (1860). *Cf.* FED. R. EVID. 803(4).advisory committee's note.

248. Dying declarations have historically been admissible only if the declarant had personal knowledge of the matters about which he spoke. *See, e.g.*, Shepard v. United States, 290 U.S. 96, 101–02 (1933); 5 WIGMORE, *supra* note 111, at § 1445, p. 304; STRONG ET AL., *supra* note 247, § 313, at 311–12; 1 GREENLEAF, Evidence § 159, at 190 (1st ed. 1842).

extant in a few states for statements of recent perception[249] or for statements of a deceased witness.[250] Courts have interpreted the "good faith" inquiry contained in such hearsay exceptions as setting forth a requirement that they establish as a prerequisite to admissibility "the declarant's incentive to accurately relate the event or condition,"[251] or to be "truthful."[252] In light of these interpretations, the "good faith" requirement is akin to the requirement of a finding of particularized guarantees of trustworthiness under *Ohio v. Roberts* for hearsay statements that do not fall within a firmly rooted hearsay exception. Indeed, courts applying these exceptions in criminal cases typically have invoked the same factors to conclude that both the "good faith" requirement of the exception and the "trustworthiness"

249. *See, e.g.*, Wisconsin Stat. § 908.045(2) ("A statement, not in response to the instigation of a person engaged in investigating, litigating, or settling a claim, which narrates, describes, or explains an event or condition recently perceived by the declarant, made in good faith, not in contemplation of pending or anticipated litigation in which the declarant was interested, and while the declarant's recollection was clear."); HAW. R. EVID. 804(b)(5) ("A statement, not in response to the instigation of a person engaged in investigating, litigating, or settling a claim, which narrates, describes, or explains an event or condition recently perceived by the declarant, made in good faith, not in contemplation of pending or anticipated litigation in which the declarant was interested, and while the declarant's recollection was clear."); WYO. R. EVID. 804(b)(5) ("In a civil action or proceeding, a statement, not in response to the instigation of a person engaged in investigating, litigating, or settling a claim, which narrates, describes, or explains an event or condition recently perceived by the declarant, made in good faith, not in contemplation of pending or anticipated litigation in which he was interested, and while his recollection was clear."); KAN. STAT. ANN. § 60-460(d)(3) ("[I]f the declarant is unavailable as a witness, by the declarant at a time when the matter had been recently perceived by the declarant and while the declarant's recollection was clear and was made in good faith prior to the commencement of the action and with no incentive to falsify or to distort.").

250. *See, e.g.*, R.I. R. EVID. 804(c) ("A declaration of a deceased person shall not be inadmissible in evidence as hearsay if the court finds that it was made in good faith before the commencement of the action and upon the personal knowledge of the declarant."); MASS. GEN. L. ANN. C. 233, s. 65 ("In any action or other civil judicial proceeding, a declaration of a deceased person shall not be inadmissible in evidence as hearsay or as private conversation between husband and wife, as the case may be, if the court finds that it was made in good faith and upon the personal knowledge of the declarant."); N.H. R. EVID. 804(b)(5) ("In actions, suits or proceedings by or against the representatives of deceased persons, including proceedings for the probate of wills, any statement of the deceased, whether oral or written, shall not be excluded as hearsay provided the Trial Judge shall first find as a fact that the statement was made by decedent, and that it was made in good faith and on decedent's personal knowledge.").

251. *See* State v. Manuel, 281 Wis. 2d 554, 572 (2005).

252. *See* Shine v. Vega, 429 Mass. 456, 469 (1999). *Accord* Kenneth E. Kraus, *The Recent Perception Exception to the Hearsay Rule: A Justifiable Track Record*, 1985 Wis. L. Rev. 1525, 1534–41 (1985).

requirement of *Roberts* are satisfied.[253] However, to the extent that the *Crawford* Court rejected this portion of *Roberts*, the Supreme Court might now view the "good faith" inquiry as a poor substitute for the "cause or circumstances" requirement. Indeed, the Rhode Island high court recently held that after *Crawford*, testimonial statements of a deceased witness cannot be admitted under the state's hearsay exception for statements of a deceased witness unless there is both unavailability and a prior opportunity for cross-examination.[254] On the other hand, if the Supreme Court views the "cause or circumstances" requirement as constitutionally insignificant (in the sense that it merely serves as a way of buoying the "imminent death" requirement), then its absence from some modern versions of the dying declaration exception to the hearsay rule will raise no Confrontation Clause concerns.

As with the "type of case" limitation, whatever uncertainty there may be regarding the scope of the common law rule at the time the Sixth Amendment was ratified, by the time the Fourteenth Amendment was adopted, common law courts throughout the United States had accepted the narrower definition of the dying declaration exception, limiting the scope of admissible declarations to those that refer to the "cause or circumstances" of the declarant's death.[255]

C. The Requirement that the Declarant be Dead

In contrast to both the "type of case" and "cause or circumstances" limitations, the requirement that the declarant actually be dead has been a constant requirement, albeit an often unspoken one, from the early common law to the late twentieth century. While this requirement was not *explicit* in the early common law decisions, it can be implied from the fact that the declarant whose dying declaration was offered into evidence was dead in *every* case in which they were admitted. This was so not only in cases involving homicide prosecutions[256] but also in non-homicide cases.[257] Moreover,

253. *See, e.g.*, State v. Scholl, 661 A.2d 55, 61 (R.I. 1995); State v. Burke, 574 A.2d 1217, 1223 (R.I. 1990). *Cf.* Hew v. Aruda, 51 Haw. 451, 457 (1969). Indeed, some applications of the "good faith" requirement may not have even satisfied the *Roberts* standard. *See* Deborah M. Kupa, *Erosion of the Confrontation Clause in the Ocean State: Admitting Declarations of a Decedent Made in Good Faith*, 1 Roger Williams U. L. Rev. 137, 170–76 (1996).

254. *See* State v. Feliciano, 901 A.2d 631, 641 (R.I. 2006).

255. *See* 5 WIGMORE, *supra* note 111, at § 1434 n.1, pp. 282–84.

256. *See* Rex v. Baker, 2 Mood. & Rob. 53, 53–54 (1837); Rex v. Woodcock, Leach Cr. Cas. 500, 500–01 (1789); Rex v. Reason, 16 How. St. Tr. 1–5, 24–31 (1722).

even in those non-homicide cases in which the evidence was rejected, the declarant was always dead.[258] In other words, counsel never even *thought* to offer dying declarations into evidence if the declarant was still alive.

Although the early common law decisions often omitted an explicit discussion of this requirement, they did typically describe the required *physical* state of the declarant when he made the statement. Some required the declarant to be *in extremis*,[259] which means "[n]ear the point of death,"[260] while others describing it as a requirement that he be *in articulo mortis*,[261] "[a]t the point of death."[262] The terms differ in that, "[u]nlike *in articulo mortis*, the phrase *in extremis* does not always mean *at* the point of death."[263] However, the courts were not always so precise as to which phrase they used and would frequently morph the two together.[264] Given the constant requirement of the common law that the declarant either be *at* or *near* the point of death when the statement was made, one can infer that the common law presumed that the person was dead at the time of trial.

So assumed was the requirement of death that courts failed to explicitly mention it in their holdings and treatise writers felt

257. *See* Aveson v. Lord Kinnaird, 6 East 188 (1805); Wright v. Littler, 3 Burr. 1244, 1247 (1761); HUME, *supra* note 42, at 229 (discussing the 1752 trial of James Macgregor and the 1753 trial of Robert Macgregor).

258. *See* Rex v. Lloyd, 4 C. & P. 233 (1830); Rex v. Mead, 2 B. & C. 605 (1824); Rex v. Hutchinson, 2 B. & C. 608 n. (a) (1822); Rex v. Drummond, 1 Leach 337 (1784).

259. *See* Hudson v. State, 43 Tenn. 355 (1866); Walston v. Commonwealth, 16 B. Mon. 15 (Ky. 1855); Montgomery v. State, 11 Ohio 424 (1842); State v. Ferguson, 2 Hill (SC) 619 (S.C. 1835). *See also* State v. Tightman, 11 Ired. 513 (N.C. 1850) ("It is not necessary, that the person should be *in articulo mortis*, (the very act of dying;) it is sufficient if he be under the apprehension of impending dissolution.").

260. BLACK'S LAW DICTIONARY (8th ed. 2004).

261. *See* Carver v. United States, 164 U.S. 694, 695 (1897); State v. Blount, 124 La. 202 (1909); Brakefield v. State, 1 Sneed (TN) 215 (Tenn. 1853); Campbell v. State, 11 Ga. 353 (1852); Hill v. Commonwealth, 2 Gratt. 594 (Va. 1845); Anthony v. State, 19 Tenn. (Meigs) 265, 277 (1838).

262. *Id.*

263. *Id. See also* Morgan v. State, 31 Ind. 193 (1869) (noting both phrases but suggesting that *in articulo mortis* is the more accurate one); Smith v. State, 28 Tenn. 9 (1848) (same). Note that some decisions to some extent mix the two phrases. *See, e.g.*, People v. Wood, 2 Edm. Sel. Cas. 71 (N.Y. 1849) ("[T]hey are admissible only when made in extremity, when the party is at the point of death.").

264. *See, e.g.*, Rex v. Woodcock, 168 Eng. Rep. 352, 352 (1789) (describing dying declarations as being "made in extremity, when the party is at the point of death"). *See also* State v. Martin, 248 P. 176, 177 (Mont. 1926) (describing the two variations as "flowery phrases of the courts" that simply mean that the statement was made "by a dying person").

comfortable asserting the same without citation to any judicial authorities. For example, a turn-of-the-nineteenth century treatise writer's entire treatment of the issue was, without any citations, as follows:

> § 347 Declarant must be dead when declarations are offered—This subdivision needs no amplification or discussion. The declarant must be dead before the declarations are admissible as dying declarations. If the declarant were alive he would have to take the witness stand or his deposition would have to be taken.[265]

Likewise, the 1972 edition of *McCormick's Handbook of the Law of Evidence* stated without exception, that the declarant must be deceased for a dying declaration to be admissible.[266]

Moreover, when the drafters of the Uniform Rules of Evidence proposed a substantial broadening of the hearsay exception for dying declarations in 1953 by eliminating the type of case limitation *and* the cause or circumstances limitation, they maintained the requirement that the declarant be "unavailable as a witness *because of his death.*"[267] Similarly, the 1974 edition of *Wigmore on Evidence* indicated that the necessity for admitting dying declarations arose from the fact the witness was dead and theorized that "[c]onceivably, there might be still a necessity if the witness, though supposed to be dying had recovered and had since left the jurisdiction, *but this case had never occurred, and the question never arose.*"[268] It then proceeded to cite the first deviations from this common law requirement that the declarant be dead, the then-proposed Federal Rules of Evidence and Nevada's statutory hearsay exception for dying declarations, codified in 1971.[269]

The question that thus arises is whether the difference between a requirement that the declarant be *dead* and one that he is merely *unavailable* has any constitutional significance (in the special case of California, one must ask the further question whether it is constitutionally permissible to dispense with the unavailability

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265. 1 ELLIOTT, *supra* note 189, at 458.

266. *See* EDWARD W. CLEARY ET AL., MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 282, at 681 (2d ed. 1972).

267. UNIF. R. EVID. 63(5).

268. 5 WIGMORE, *supra* note 111, §1431, at 276 (emphasis added).

269. *Id.* at 276–77, n.1 (citing Proposed FED. R. EVID. 804(b)(2); Nev. Stat. § 51.335).

requirement altogether where dying declarations are concerned, since they are the only state to have done so).

In illustration of problems that could arise from a more expansive definition of the requirement that the declarant be dead, the drafters of Wisconsin's dying declaration hearsay exception noted that "[w]here unavailability of the declarant is caused by death, there are no confrontation problems" but that "with the expanded definition of unavailability . . . confrontation problems may arise."[270] Indeed, to the extent that the United States Supreme Court treats the dying declaration exception as a historical exception directly tied to the scope as it existed at common law (whether in 1791 or 1868), expanding the requirement that the declarant be dead to include "unavailability" would appear constitutionally suspect.

However, I propose that there is a different way to read the rule set forth in *Crawford* and to apply it in the specific context of the dying declaration exception to the hearsay rule. Under *Crawford*, the general rule is that a testimonial hearsay statement is admissible "only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine."[271] This two-pronged rule requires *both* unavailability *and* a prior opportunity to cross-examine. Indeed, when the *Crawford* court discussed the likely exception for dying declarations, it couched it in the context of the "prior opportunity to cross-examine" prong of the rule that it announced.[272]

Under my proposed approach, one can divide the various common law elements of the dying declaration exception to the hearsay rule into two parts. On the one side is the common law requirement that the declarant be dead, and on the other side are all of the other requirements. The common law requirement that the declarant be dead can then be viewed as going to the unavailability requirement of *Crawford*, while the remaining common law requirements can be viewed collectively as serving as a *sui generis* historical substitute for the "prior opportunity to cross-examine" requirement.

The constitutional test for "unavailability," which *Crawford* did not purport to change,[273] is whether the government has made "a

270. WIS. STAT. § 908.045(3) (1953), judicial council committee's note.

271. Crawford v. Washington, 541 U.S. 36, 59 (2004).

272. *See id.* at 56 & n.6.

273. *See, e.g.*, United States v. Tirado-Tirado, 563 F.3d 117, 123 n.3 (5th Cir. 2009).

good-faith effort to obtain [the declarant's] testimony at trial."[274] That requirement is certainly satisfied if the declarant is dead.[275]However, that requirement can likewise be satisfied if a declarant is physically unavailable to testify—e.g., due to illness—with courts considering the nature of the illness, the expected time of recovery, and the importance of the declarant's testimony in determining whether the good faith standard is met.[276]

In *California v. Green*,[277] the U.S. Supreme Court held that not only do death and physical inability to testify satisfy the constitutional requirement of unavailability, but so do situations in which a witness appears but has a failed memory, claims a privilege, or refuses to testify.[278] According to the Court, in such circumstances, the government's obligation to satisfy the good faith standard is to "produce [the witness] at trial, [swear] him as a witness, and tender[] him for cross-examination."[279] Significantly, the Court in *Green* rejected an argument that witnesses should be treated as unavailable only if they are dead or physically unable to appear, but not if they physically appear but do not testify. The Court reasoned that: "As long as the state has made a good-faith effort to produce the witness, the actual presence or absence of the witness *cannot be constitutionally relevant.*"[280]

This statement in *Green*, coupled with the theory that the components of the dying declaration exception should be divided between those elements that go to the unavailability prong of *Crawford* and those that go to the "prior opportunity to cross-examine" prong suggests that modern versions of the dying declaration hearsay exception may pass constitutional muster so long as the "good faith" standard is satisfied. However, even under this more liberalized theory, California's dying declaration exception, which eliminates the unavailability requirement altogether, would not pass constitutional muster.

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274. *See* Ohio v. Roberts, 448 U.S. 56, 74 (1980); Barber v. Page, 390 U.S. 719, 725 (1968).

275. *See Roberts*, 448 U.S. at 74.

276. *See* United States v. Jacobs, 97 F.3d 275, 282 (8th Cir. 1996); Ecker v. Scott, 69 F.3d 69, 71–73 (5th Cir. 1995); Burns v. Clusen, 798 F.2d 931, 937 (7th Cir. 1986); Earl v. State, 672 So. 2d 1240, 1242–43 (Miss. 1996).

277. 399 U.S. 149 (1970). Although *Green* antedates *Crawford*, both *Green* and *Barber v. Page* (upon which *Green* relied on the issue of unavailability) were cited with approval in *Crawford*. *See Crawford*, 541 U.S. at 57.

278. *Id.* at 165–68.

279. *Id.* at 166–67.

280. *Id.* at 167, n.16 (emphasis added).

D. Further Wrinkles: Religious Beliefs and State Constitutional Law

There are two further wrinkles to consider in determining the admissibility of dying declarations after *Crawford*. The first involves considering the religious beliefs of the declarant whose dying declaration is offered into evidence, and the second involves the impact that *state* constitutional provisions may have on the admissibility of dying declarations.

1. The Declarant's Religious Beliefs

One of the oft-repeated rationales for the common law dying declaration exception is that "no person, who is immediately going into the presence of his Maker, will do so with a lie upon his lips."[281] Given that rationale, a number of common law decisions deemed a dying declaration inadmissible where the declarant did not believe in the existence of a Higher Power or a "future state of rewards and punishments."[282] Indeed, a recent Wisconsin decision noted:

> The basis of the rule at common law was the motivation of the declarant, which was the awareness of the imminence and certainty of death *while burdened with unabsolved mortal sin*, which would, at death, result in immediate condemnation of the declarant to an eternity in hell. It was the fearful consequence of damnation which guaranteed the truth of the declarant's statement, not the mere imminence or certainty of death.[283]

This decision suggests that an *element* of the dying declaration exception to the Confrontation Clause is proof that the declarant believed in a Supreme Being, and that the absence of that factor in all modern versions of the dying declaration exception to the hearsay rule constitutes a violation of the Confrontation Clause. However, this implication is unlikely for several reasons.

As an initial matter, although there were oblique references to this in some of the early cases and treatises, it is not clear that this principle had gelled in the early common law extant at the time the Sixth Amendment was ratified. For example, in *Rex v. Woodcock*,[284]

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281. *See* Idaho v. Wright, 497 U.S. 805, 820 (1990) (quoting Queen v. Osman, 15 Cox Crim. Cas. 1, 3 (Eng. N. Wales Cir. 1881)).

282. *See* Wright v. State, 135 So. 636, 636–37 (Ala. 1931); Donnelly v. State, 26 N.J.L. 463, 13 (Sup. Ct. 1857); 1 GREENLEAF, *supra* note 161, § 157, at p. 188.

283. Memorandum Regarding the Dying Declaration at 7, Wisconsin v. Jensen, Case No. 02 CF 0314 (April 7, 2008).

284. 158 Eng. Rep. 352, 352 (1789).

the court raised the question of "whether the deceased herself apprehended that she was in such a state of mortality as would inevitably oblige her soon to *answer before her Maker for the truth or falsehood of her assertions*."[285] Analogously, in his treatise on Pleas of the Crown, East wrote that "no man could be disposed under such circumstances to belie his conscience: *none at least who had any sense of religion*."[286] However, it was not until the 1829 decision in *Rex v. Pike*[287] that a dying declaration was deemed inadmissible on the ground that it was not shown that the deceased "had any idea of a future state."[288]

Furthermore, even accepting that the common law deemed it *significant* that the declarant did not believe in a Supreme Being, it is far from clear that this was viewed as an *element* of the dying declaration exception itself that raised a question about a statement's *admissibility* as a dying declaration. Rather, a close analysis of the cases reveals that their focus on the declarant's absence of such a belief was relevant to two other issues: The declarant's *competence* as a witness, and the *weight* to be given to the declarant's statement once admitted into evidence.

At common law in both the United States and England and well into the twentieth century in the United States, a person who did not believe in a Supreme Being was deemed *incompetent* to testify as a witness based on the theory that without such a belief, the oath was meaningless (and, by extension, so was any testimony that the witness might give).[289] Under this theory, if the deceased would have been "incompetent" to testify had he survived (due to, *inter alia*, the absence of religious belief), it followed that the declarant's dying declarations likewise should not be received into evidence and was thus inadmissible.[290]

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285. *Id.* at 503 (emphasis added).

286. *See* EAST, *supra* note 149, at 354 (emphasis added).

287. Rex v. Pike, 172 Eng. Rep. 562, 562 (1829).

288. *Id.* at 599. *Accord* Regina v. Perkins, 173 Eng. Rep. 884, 884–85 (1840).

289. *See* Wright v. State, 135 So. 636, 639 (Ala. App. 1931); State v. Estabrook, 91 P.2d 838, 848 (Or. 1939); McClellan v. Owens, 74 S.W.2d 570, 576 (Mo. 1934); State v. Hood, 59 S.E. 971, 972 (W. Va. 1907). *See generally* Paul W. Kaufman, *Disbelieving Nonbelievers: Atheism, Competence, and Credibility in the Turn of the Century Courtroom*, 15 Yale J.L. & Human. 395, 416–18 (2003).

290. *See* Marshall v. State, 121 So. 72 (Ala. 1929); State v. Ah Lee, 8 Or. 214, 218 (1880); Donnelly v. State, 26 N.J.L. 463 (1857); Lambeth v. State, 23 Miss. 322 (1852); 1 GREENLEAF, EVIDENCE § 157, at p. 188 (1st ed. 1842). *See also* Rex v. Drummond, 168

Yet rather than being an *element* of the dying declaration exception itself, this is best viewed as falling within a broader rule that dying declarations (and hearsay generally) are inadmissible under any circumstances in which the declarant himself would have been incompetent to testify had he appeared and testified as an ordinary witness.[291] So construed, the Confrontation Clause should not be construed to require that the declarant satisfy the specific witness competency rules extant at common law. Rather, the declarant's dying declaration should be admissible so long as he would be competent to testify as an ordinary witness under the then-existing competency rules.[292]

Over time, states eliminated lack of religious belief as a basis for deeming a witness incompetent.[293] As a result, some courts have deemed the absence of such beliefs irrelevant with regards to the admissibility of dying declarations.[294] While this is true so far as questions regarding the *competency* of the declarant (and thus the *admissibility* of his dying declaration) are concerned, there is one other reason why the absence of religious belief is nonetheless a relevant consideration. A *theoretical* justification for the trustworthiness of dying declarations at common law was that a person would not want to meet his Maker with a lie on his lips for fear of supernatural punishment in the afterlife. To the extent that a

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Eng. Rep. 271 (1784) (holding dying declaration not admissible because it was made by convicted felon, who would have been incompetent to testify had he been alive).

291. *See* Carver v. United States, 164 U.S. 694, 697 (1897).

292. In a similar vein, common law cases and early treatises hold that dying declarations are admissible only if the dying declarant had personal knowledge of the matters about which he spoke. *See, e.g.*, Shepard v. United States, 290 U.S. 96, 101–02 (1933); 5 WIGMORE, *supra* note 111, § 1445, at 304; STRONG ET AL., *supra* note 247, § 313, at 311–12; 1 GREENLEAF, EVIDENCE § 159, at p. 190 (1st ed. 1842). One reading of such authorities is that personal knowledge is thus another element of the common law dying declaration exception and that its absence creates a Confrontation Clause problem. *See* Taylor v. Michigan, 737 N.W.2d 790 (Mich. 2007), Petition for Writ of Certiorari (2008). But an alternative reading is that the requirement of personal knowledge falls more generally under the broad rule that dying declarations are inadmissible under any circumstance that would make the declarant incompetent to testify as an ordinary witness. *See Carver*, 164 U.S. at 697. So construed, the Confrontation Clause would not be construed to require that the declarant satisfy the *specific* witness competency rules extant at common law. Rather, the declarant's dying declaration would be admissible so long as he would be competent to testify as an ordinary witness under the then-existing competency rules, including the requirement that the declarant testify from personal knowledge.

293. *See* FED. R. EVID. 601 advisory committee's note.

294. *See* State v. Williams, 209 P. 1068 (Idaho 1922); *Ah Lee*, 8 Or. 214 at 218.

belief in such an afterlife was lacking, however, so too was the *trustworthiness* of the statements.[295] As Wigmore puts it,

> If in the jurisdiction a witness is no longer affected by the common-law rule requiring an oath and the capacity to take an oath, i.e., the possession of a specific theological belief, the declarant's belief is immaterial in determining his oath capacity. But even where this common-law rule is abolished, his belief may still become material with reference to the admissibility of this specific class of declaration.[296]

For this reason, numerous common law decisions throughout the nineteenth and twentieth centuries from jurisdictions that have abrogated the common law ground of incompetency for lack of religious belief have nonetheless deemed such a lack of belief to be pertinent to the specific issue of admitting the non-believer's dying declaration.[297] Indeed, even as late as 1982, one can find decisions

295. *See* Goodall v. State, 1 Or. 333, 335 (1861) ("But when the deceased was a disbeliever, and, consequently, under no apprehension of future punishment for his falsehood, it is reasonable to believe that, however much he may be impressed with the fear of immediate and certain death, still he would not be under such strong influences to make a true statement of the facts as one impressed with the belief of future accountability.").

296. *See* 5 WIGMORE, *supra* note 111, § 1443, at 303. *Accord* ELLIOTT, *supra* note 189, § 350, at 462–63.

297. *See* McClellan v. Owens, 74 S.W.2d 570, 577–78 (Mo. 1934); Marshall v. State, 121 So. 72, 84 (Ala. 1929) ("In all the following cases and text-books, it was held that, when there is such religious unbelief as, at common law, would disqualify a witness, evidence of such unbelief is admissible to discredit a dying declaration, even where there is a statute or constitutional provision which abrogates the common law in this respect."); People v. Lim Foon, 155 P. 477, 477 (Cal. App. 3d 1915) ("Undoubtedly, if it were made to appear that the declarant was wholly obtuse to religious convictions, and that he entertained complete disbelief in a future spiritual existence or had no regard whatsoever for the theory of rewards and punishments in the hereafter, his statement in extremis would not be supported by those considerations which may naturally be supposed to exercise an overruling influence upon the minds of men in such circumstances, and in such case, even if, nevertheless, the competency of the declaration as evidence would not be destroyed, the credibility of it would be greatly impaired, and when given under such circumstances it should never be submitted to a jury unaccompanied by an explicit admonition by the court that it should be viewed with great caution."); State v. Blount, 50 So. 12, 14 (La.1909) ("And where by statute a want of religious belief is no longer a disqualification of witnesses, although the irreligious character of the declarant cannot be relied on to exclude his dying declaration, it may be shown that he did not believe in a future state of rewards and punishments, for the purpose of impeaching his credibility; for such a person, although in articulo mortis, might not be solemnly impressed with the necessity of speaking the truth."); Gambrell v. State, 46 So. 138, 138 (Miss. 1908) (citing Hill v. State, 64 Miss. 431 (1887)) (holding that, even though not admissible for purpose of rendering dying declaration incompetent, it is admissible as affecting the weight to be given it by the

indicating the pertinence of the declarant's belief in "a future state of rewards or punishment" so far as dying declarations are concerned.[298]

However, in taking this factor into account, these common law courts have not treated it as an *element* of the dying declaration exception to the hearsay rule that is critical to its *admissibility*. Rather, these decisions deemed the dying declarations to be admissible but held that they could be impeached by allowing the opposing party to introduce evidence of the person's lack of religious belief, and left it to the jury to assess the weight and credibility of the statement.[299] This distinction between admissibility and weight is sensible. Although the religious ground is one basis for deeming such statements trustworthy, there exist psychological and physiological justifications for the trustworthiness of such declarations as well.[300]

Accordingly, the declarant's religious beliefs do not constitute an *element* of the common law exception, although they might be relevant to the weight conferred on the dying declaration. Thus, modern versions of the exception that do not include this factor should not raise any concerns under the Confrontation Clause.[301]

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jury); People v. Chin Mook Sow, 51 Cal. 597 (1877) (distinguishing between using lack of religious belief on the issue of *competency* versus using it to affect the credibility of a dying declaration).

298. *See* State v. Quintana, 644 P.2d 531, 534 (N.M. 1982).

299. *See Marshall,* 121 So. at 75.; McClendon v. State, 251 P. 515 (Okla. 1926); State v. Rozell, 225 S.W. 931 (Mo. 1920); *Lim Foon*, 155 P. at 481; *Blount*, 50 So. at 14.; *Gambrell, 46 So. at 138.*; Carver v. United States, 164 U.S. 694, 697–98 (1897) (holding that evidence that the deceased "did not believe in a future state of rewards or punishment" admissible to discredit their dying declaration); State v. Elliott, 45 Iowa 486 (1877). *See generally* Kaufman, *supra* note 289, at 412–15.

300. *See generally* 5 WIGMORE, *supra* note 111, § 1443, at 302.

301. If there is a problem with admitting such evidence, it is not, in my view, a First Amendment Establishment Clause problem. After all, extant in virtually every state today is a testimonial privilege for communications with clergy, which is unavailable to those who don't in any way subscribe to or participate in organized religion, yet such a privilege has been deemed not to present an Establishment Clause problem. *See* Madison v. Riter, 355 F.3d 310, 320 (4th Cir. 2003). *See generally* Ronald J. Colombo, *Forgive Us Our Sins: The Inadequacies of the Clergy Penitent Privilege*, 73 N.Y.U. L. Rev. 225 (1998); Chad Horner, *Beyond the Confines of the Confessional: The Priest-Penitent Privilege in a Diverse Society*, 45 Drake L. Rev. 697, 721–28 (1997). *But see* In re Lifschutz, 467 P.2d 557, 560 (Cal. 1970) (characterizing this as a "potentially difficult constitutional question"); Stoyles, *The Dilemma of the Constitutionality of the Priest-Penitent Privilege—The Application of the Religion Clauses*, 29 U. Pitt. L. Rev. 27, 39–56 (1967) (describing the tension between the Free Exercise Clause's requirement that such a privilege be recognized and the Establishment Clause). Rather, admitting such evidence may run afoul of Federal Rule 610 (and its state court analogues), which provides that "[e]vidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing

2. The Impact of State Constitutions

Most states' constitutions include analogous provisions to the Confrontation Clause of the United States Constitution. Although some state courts have held that these provisions are *identical* in scope to the federal provision,[302] many others give these provisions *independent* meaning.[303] Accordingly, even if admitting a dying declaration passes muster under the Confrontation Clause of the United States Constitution, admitting the dying declaration may nonetheless run afoul of its counterpart in the relevant state constitution.

Additionally, just as precedent pertaining to the Confrontation Clause of the United States Constitution looks to the common law extant at the time of its adoption to determine its scope, so too does precedent interpreting the scope of state versions of the same look to the common law extant at the time the *state* constitutional provisions were adopted.[304] Moreover, most states adopted constitutions well after 1791 and throughout the nineteenth and twentieth centuries.

Accordingly, even if one were to assume that the scope of the dying declaration exception to the Confrontation Clause as applied to the states via the Fourteenth Amendment is to be determined by reference to the common law as it stood in 1791 (as opposed to 1868), and even if one accepts the broader interpretation of what the common law rule was in 1791, modern versions of the dying declaration exception extant in states today that fall within the scope of the common law rule as it stood in 1791 may nonetheless be deemed unconstitutional. This is because they would also be subject to scrutiny under independent *state* constitutional provisions that were adopted and are interpreted by the common law as it stood in

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that by reason of their nature the witness' credibility is impaired or enhanced." *See* STRONG ET AL., *supra* note 247, at § 309, at 305–06, n.2.

302. *See, e.g.*, State v. Kent, 918 A.2d 626, 641–42 (N.J. 2007); Wilson v. City of Pine Bluff, 643 S.W.2d 569, 569–70 (Ark. 1982).

303. *See, e.g.*, State v. Fields, 168 P.3d 955, 968 (Haw. 2007) (continuing to apply *Roberts* analysis to non-testimonial hearsay as a matter of state constitutional law, notwithstanding its conclusion that such analysis is no longer required by the federal constitution); People v. Chavez, 605 P.2d 401, 410–13 (Cal. 1980).

304. *See, e.g.*, Gannon v. State, 704 A.2d 272, 278 (Del. 1998) (identifying the common law in 1792, the year when the Delaware Constitution was adopted, as the relevant body of law for determining the scope of Delaware's analogue to the Confrontation Clause); Commonwealth v. Bergstrom, 524 N.E.2d 366, 374 (Mass. 1988) ("[W]hen a witness is unavailable, the standard of admissibility is met when the admitted evidence is recognized as being an 'acknowledged exception[ ] to the face to face rule of evidence' *at the time of the State Constitution's adoption.*") (emphasis added).

the nineteenth and twentieth centuries, when the scope of the common law exception had narrowed.

Further wrinkles will likely arise in challenging modern versions of the dying declaration exception to the hearsay rule on state constitutional grounds. First, states might decide *not* to recognize any dying declaration exception to their constitutional provisions (although, as indicated in the introduction, many states already did so in the nineteenth century). Moreover, for states that subsequently adopted new constitutions, they will have to determine whether the relevant date for determining the scope of the exception is the common law as it stood at the time of the original constitution or the newly adopted one.

Conclusion

Assuming that the Supreme Court confirms that there exists a dying declaration exception to the Confrontation Clause, there are at least three additional constitutional questions for the Court to resolve. First, whether the exception can be invoked only in homicide cases (and, more narrowly, those in which the death of the declarant is the subject of the charge), or whether it can be invoked in other types of criminal cases as well. Second, whether it only encompasses statements concerning the cause or circumstances of the declarant's impending death (or what he believed to be his impending death), or whether it can be invoked to admit unrelated statements. Third, whether the declarant must die, or whether it suffices that he is merely unavailable.

The answers to each of these constitutional questions hinges upon how the Supreme Court resolves three additional issues: choosing among competing *versions* of history; choosing among competing *points* in history that matter (1791 versus 1868); and deciding whether to characterize the historical elements of the dying declaration exception in narrow or broad terms for Confrontation Clause purposes.

So far as the first two constitutional questions regarding the "type of case" and "cause or circumstances" limitations are concerned, the answer will differ depending on how the court resolves competing characterizations of the common law elements of the dying declaration exception at specific points in history, as well as its resolution as to *which* point in history is relevant. If the relevant date is 1868, resolution will result in a narrow exception to the Confrontation Clause for dying declarations. At that point in history,

the common law uniformly limited the admissibility of dying declarations to homicide cases and admitted only those concerning the cause or circumstances of the declarant's impending death.

If, on the other hand, the relevant date is 1791, one encounters competing characterizations of the elements of common law rule. Under one reading of the cases, neither a "type of case" limitation nor a "cause or circumstances" limitation was extant at the time the Sixth Amendment was adopted. However, one could attempt to characterize the cases as implicitly admitting such declarations only in homicide cases in which the death of the declarant was the subject of the charge, and the circumstances of her death the subject of the declaration. If interpreted through this lens, the constitutional question would be answered in the same way regardless of whether the 1791 or the 1868 date is used.

Accordingly, in this situation, a focus on 1791 versus 1868 may be outcome determinative, and thus, one which the Supreme Court will have to resolve. To the extent that one is dealing with the *federal* government, 1791 would remain the correct focus. However, it remains an open question whether 1791 or 1868 is the correct focus to the extent we are applying the Sixth Amendment to the states via the Fourteenth Amendment. If 1868 is the correct focus so far as states are concerned, the scope of the dying declaration exception to the Confrontation Clause will differ depending upon whether it is invoked in federal or state proceedings.

Ironically, if the Court rules that the broader 1791 definition applies in federal proceedings and the narrower 1868 definition applies in state proceedings, the effect would be to create room for the scope of the federal dying declarations exception to expand while many states would concurrently be forced to contract the scope of their dying declarations exceptions. The reason for this drastically different outcome is that the federal dying declarations exception largely tracks the narrower common law rule as it stood in 1868: In criminal cases, it can be invoked only in homicide cases, and it contains the "cause or circumstances" limitation.[305] In contrast, many state versions of the dying declaration exception are much closer in scope to the common law rule as it stood in 1791 because they eliminated either the "type of case" or "cause or circumstances" limitations.

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305. *See* FED. R. EVID. 804(b)(2). Although dying declarations are admissible in civil cases as well under the federal rule, the Confrontation Clause is inapplicable in such proceedings.

Moreover, the answers to all three constitutional questions depends on whether one characterizes the historical elements of the dying declaration exception in narrow or broad terms. In considering this point, I assume that the common law (whichever date is chosen) required that the declarant be dead; that the declarant believed his death to be imminent when he made the statement; that the statement concern the cause or circumstances of the declarant's death; and that the statements were admissible only in homicide cases (and perhaps only those in which the death of the declarant was the subject of the charge). If one narrowly characterizes the scope of the dying declaration exception to the Confrontation Clause to require these precise elements, then a hearsay statement admitted under any modern version of the dying declaration exception that deviates from these common law requirements is constitutionally infirm as applied in cases in which any of the common law elements are lacking.

But I would suggest that there is an alternative, less "formalistic and wooden"[306] way of defining the scope of the dying declaration exception to the Confrontation Clause that, while remaining true to the common law history of the exception and the spirit of *Crawford* and its progeny, does not cast quite so dark a cloud of constitutional doubt over the versions of the dying declaration exceptions to the hearsay rule extant throughout the United States today.

Under this alternative approach, one can use *Crawford*'s twin requirements for admitting testimonial hearsay of unavailability and a prior opportunity for cross-examination as a starting point. One can then view the common law requirement that the declarant be dead as going to the unavailability requirement and, consistent with *California v. Green*, can conclude that any form of unavailability, including death, will satisfy that requirement so long as the good faith standard is satisfied. Under this view, the other elements of the common law exception form the historical exception to the prior opportunity for cross-examination requirement.

One can then posit that of the remaining common law elements, the *key* element is the declarant's belief that death be imminent. After all, that element, which *every* modern version of the dying declaration hearsay exception contains,[307] is *the* element consistently

306. Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2544 (Kennedy, J., dissenting) (2009).

307. *See* FED. R. EVID. 804(b)(2); ALA. R. EVID. 804(b)(2); ALASKA R. EVID. 804(b)(2); ARIZ. R. EVID. 804(b)(2); ARK. R. EVID. 804(b)(2); CAL. EVID. CODE § 1242; CONN. CODE OF EVID. § 8-6(2); COLO. REV. STAT. ANN. § 13-25-119(1); DEL. R. EVID. 804(b)(2); FLA. STAT. ANN. § 90.804 (2)(b); GA. CODE ANN. § 24-3-6; 6 GUAM CODE

cited both in early English common law decisions,[308] subsequent common law decisions in the United States,[309] and respected treatises[310] as giving dying declarations an equivalency to testimony given under oath, and thus provides the "historical basis" for satisfying the prior opportunity for cross-examination requirement.

Under this view, the cause or circumstances limitation could be viewed as *one* way of providing assurance that the constitutionally

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ANN. § 804(b)(2); HAW. R. EVID. 804(b)(2); IDAHO R. EVID. 804(b)(2); IND. R. EVID. 804(b)(2); IOWA R. EVID. 804(b)(2); KAN. STAT. ANN. § 60-460(e); KY. R. EVID. 804(b)(2); LA. CODE EVID. ART. 804(B)(2); ME. R. EVID. 804(b)(2); MD. R. EVID. 5-804(b)(2); MICH. R. EVID. 804(b)(2); MINN. R. EVID. 804(b)(2); MISS. R. EVID. 804(b)(2); MONT. R. EVID. 804(b)(2); NEB. REV. STAT. § 27-804(2)(b); NEV. REV. STAT. § 51.335; N.H. R. EVID. 804(b)(2); N.J. R. EVID. 804(b)(2); N.M. R. 11-804(B)(2); N.C. R. EVID. 804(b)(2); N.D. R. EVID. 804(b)(2); N. MAR. I. R. EVID. 804(b)(2); OHIO R. EVID. 804(b)(2); 12 OKLA. STAT. ANN. § 2804(B)(2); OR. REV. STAT. ANN. §40.465(3)(b); PA. R. EVID. 804(b)(2); P.R. ST. T.32 AP. IV, R. 64(A); R.I. R. EVID. 804(b)(2); S.C. R. EVID. 804(b)(2); S.D. STAT. §§ 19-16-31, 23A-22-12; TEX. R. EVID. 804(b)(2); UTAH R. EVID. 804(b)(2); VT. R. EVID. 804(b)(2); 5 V.I. CODE § 932(5); WASH. R. EVID. 804(b)(2); W.VA. R. EVID. 804(b)(2); WIS. STAT. § 908.045(3); WYO. R. EVID. 804(b)(2); People v. Tilley, 94 N.E.2d 328, 331-332 (Ill. 1950); People v. Becker, 109 N.E. 127, 133 (N.Y. 1915).

308. *See* Rex v. Woodcock, 168 Eng. Rep. 352, 353 (1789) ("Now the general principle on which this species of evidence is admitted is, that they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone: when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn, and so awful, is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a Court of Justice."); Rex v. Drummond, 168 Eng. Rep. 271, 271 (1784) ("The principle upon which this species of evidence is received is, that the mind, impressed with the awful idea of approaching dissolution, acts under a sanction equally powerful with that which it is presumed to feel by a solemn appeal to God upon an oath. The *declarations* therefore of a person dying under such circumstances, are considered as equivalent to the *evidence* of the living witness upon oath.").

309. *See* Thurston v. Fritz, 138 P. 625, 626 (Kan. 1914) ("The theory on which dying declarations have been admitted is that the realization of impending death operates on the mind and conscience of the declarant with strength equal to that of an ordinary oath administered in a judicial proceeding."); Donnelly v. State, 26 N.J.L. 463, 21 (1857) ("Dying declarations derive their sanction, as testimony, from the fact that they are made under the apprehension of approaching dissolution, in the view and expectation of speedy death; the situation of the party, under such solemn circumstances, creating a sanction equally impressive with that of an oath administered in a court of justice."); State v. Moody, 3 N.C. 31, 1 (1798) ("[T]hey must be the declarations of a dying man, of one so near his end that no hope of life remains, for then the solemnity of the occasion is a good security for his speaking the truth, as much so as if he were under the obligation of an oath.").

310. *See* 1 GREENLEAF, *supra* note 161, §156, at p. 186; EAST, *supra* note149, § 124, 353–54 ("[I]t must appear that the deceased at the time of making such declarations was conscious of his danger; such consciousness being considered as equivalent to the sanction of an oath."); ELLIOTT, *supra* note 189, §334, at 445 ("[T]he mind, impressed with the awful idea of approaching dissolution, acts under a sanction equally powerful with that which it is presumed to feel, by a solemn appeal to God on oath."); 5 WIGMORE, *supra* note 111, § 1438, at 289–91 (collecting cases).

significant element (belief in imminent death) is satisfied, and thus modern substitutes, such as a finding that the declarant made the statement in "good faith" (a distinct "good faith" inquiry from the one required when dealing with unavailability) may serve as a valid substitute inquiry. Alternatively, both the "cause or circumstances" and the "type of case" limitations could be viewed as surplusage lacking constitutional significance.

The Supreme Court's recent reference to the "historic exception" for dying declarations in *Giles v. California* is consistent with the view that neither the "cause or circumstances" nor the "type of case" limitations are part of the constitutional definition of a dying declaration. In *Giles*, the Court did not use a definition that referred to either homicide cases or the cause or circumstances of the declarant's impending death. Rather, the Court described dying declarations as "declarations made by a speaker who was both on the brink of death and aware that he was dying."[311] Indeed, a recent decision by the Supreme Court of Kansas concluded that the evidence at issue passed constitutional muster because it fell within the scope of the specific definition set forth in *Giles*—namely that the speaker was both on the brink of death and aware that he was dying.[312]

The dying declaration exception to the hearsay rule is certainly not without its critics, who might welcome a "formalistic and wooden" approach to the Confrontation Clause question as an opportunity to narrow the scope of the dying declaration exception when invoked against the accused in a criminal case. Such critics question the reliability of dying declarations on two fronts. First, they dispute the premise that those on the verge of death necessarily lose any motivation to be untruthful, noting that the desire for revenge against one's enemies is a powerful force that can overcome any psychological motivation to speak truthfully.[313] Second, they point out that the physical trauma experienced by those on the verge of death may negatively impact their powers of perception, memory, comprehension, and clarity of communication.[314] Despite the fact that *Crawford* sounded the death knell for reliability as the touchstone for admissibility of hearsay evidence when challenged on Confrontation Clause grounds, such concerns about the reliability of dying

311. *See* Giles v. California, 128 S. Ct. 2678, 2682 (2008).

312. *See* State v. Jones, 315 P. 3d 815, 821–22 (Kan. 2008).

313. *See* Polelle, *supra* note 25, at 301–02; Bryan A. Liang, *Shortcuts to "Truth": The Legal Mythology of Dying Declarations*, 35 Am. Crim. L. Rev. 229, 238 (1998).

314. *See* Polelle, *supra* note 25, at 302–03; Liang, *supra* note 313, at 236–43.

declarations may impact the Court's decision of whether to broadly or narrowly construe the scope of the dying declaration exception to the Confrontation Clause.

Even if the Court were to favor the narrowest interpretation of each of the constitutional inquiries, that would not fully invalidate broad, modern versions of the dying declaration exception to the hearsay rule for several reasons. First, the Confrontation Clause is inapplicable when offered under such modern exceptions in a civil case. Second, the Confrontation Clause would not pose a bar to admissibility if the *accused* offered a dying declaration on his own behalf and against the government to exonerate himself. Third, the Confrontation Clause would not present a bar to admissibility if the declarant were to appear at trial and be subjected to cross-examination concerning the statement. Fourth, the Confrontation Clause would pose no bar to admissibility if, at the time the dying declaration were given, the accused *did* have an opportunity to cross-examine the dying declarant. Finally, if the evidence were offered for some reason other than to prove the truth of the matter asserted, the Confrontation Clause would pose no bar to admissibility.

Moreover, despite how the United States Supreme Court resolves these questions, a parallel set of questions will present themselves in state courts interpreting analogous state constitutional provisions across the country. Such courts will have to determine first, whether their analogues to the Confrontation Clause of the United States Constitution are to be interpreted independently. If so, the state courts will have to determine whether or not to recognize a dying declaration exception to their constitutional provisions and the scope of the exception if they choose to recognize it. If the scope is to be determined by reference to the common law at the time the state constitutional provision was adopted, they will have to determine what the scope of the common law was at that point in time. States that adopted new constitutions will have to determine whether the relevant date for determining the scope of the exception is the common law as it stood at the time of the original constitution or the newly adopted one.

In sum, when the admission of a dying declaration is challenged on Confrontation Clause grounds, courts cannot simply rely on footnote six of *Crawford* to hold that dying declarations fall within a historical exception to the Confrontation Clause. Rather, to determine the scope of the dying declaration exception to the Confrontation Clause, courts must engage in a multi-faceted inquiry that requires them first to determine which point in the history of the

common law to use to determine the scope of the historical exception and next to determine what the scope of the exception was at that time. Furthermore, the courts will be required to determine which elements of the historical exception are *constitutionally significant.* From there, courts can determine the constitutionality of admitting the dying declaration by determining whether it satisfies the constitutionally significant elements of the common law exception at the requisite point in time. Finally, to the extent that one is dealing with evidence offered in state court proceedings, courts will have to repeat the above inquiry for the analogous provisions found in state constitutions.

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